EDITOR'S NOTE

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o. 86-39-CFX
tatus: GRANTED

Title: Burlington Northern Railroad Company, et al., Petitioners
v.
Brotherhood of Maintenance of Way employees, et al.

ocketed:
uly 15, 1986

Court: United States Court of Appeals for the Seventh Circuit

ee also:
86-175

Counsel for petitioner: Lee, Rex E.

Counsel for respondent: Clarke Jr., John O'B.

ntry	Date	Note	Proceedings and Orders
1	Jul 15 1986	G	Petition for writ of certiorari filed.
3	Aug 8 1986		Order extending time to file response to petition until September 14, 1986.
4	Aug 8 1986		The above extension applies to all respondents.
5	Aug 15 1986		Brief amicus curiae of Natl. Railway Labor Conference filed.
6	Aug 18 1986		Brief amicus curiae of Natl. Industrial Transportation League filed.
7	Aug 29 1986		Brief of respondent Bhd. of Maintenance Employ. in opposition filed.
8	Sep 10 1986		DISTRIBUTED. September 29, 1986
10	Oct 1 1986	X	Supplemental brief of petitioner Burlington No. RR Co., et al. filed.
11	Oct 6 1986		Petition GRANTED. Justice Scalia OUT.
			**********
12	Nov 20 1986		Record filed.
13	Nov 20 1986		Certified copy of C. A. proceecings received.
14	Nov 20 1986		Brief amicus curiae of Natl. Industrial Transportation League filed.
15	Nov 20 1986		Brief amicus curiae of Natl. Railway Labor Conference filed.
16	Nov 20 1986		Joint appendix filed.
17	Nov 20 1986		Brief of petitioners Burlington No. RR Co., et al. filed.
19	Dec 16 1986		Order extending time to file brief of respondent on the merits until January 12, 1987.
20	Dec 19 1986		SET FOR ARGUMENT. Monday, February 23, 1987. (1st case).
21	Jan 10 1987		Order further extending time to file brief of respondent on the merits until January 14, 1987.
22	Jan 14 1987		Brief of respondents Bhd. of Maintenance Way Employees, et al. filed.
23	Jan 15 1987		Record filed.
24	Jan 16 1987		CIRCULATED.
25	Feb 9 1987	X	Reply brief of petitioners Burlington No. RR Co., et al. filed.
26	Feb 23 1987		ARGUED.

86-39

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BURLINGTON NORTHERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, BALTIMORE AND OHIO CHICAGO TERMINAL COMPANY, CHESAPEAKE AND OHIO RAILWAY COMPANY, and CSX TRANSPORTATION, INC.,

Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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July 15, 1986

QUESTIONS PRESENTED

1. Whether the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, precludes a federal court from enjoining secondary picketing by a rail union against rail carriers no matter how remote the connection between the primary employer and the picketing victims?

2. Whether the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, prohibits secondary picketing and empowers a federal court to enjoin such picketing, notwithstanding the restrictions on the court's equity power embodied in the Norris-LaGuardia Act?

PARTIES TO THE PROCEEDING

Other respondents, in addition to those in the caption, are the following listed International and Local officers of the respondent labor organization: *

O. M. Berge
C. E. Henderson
D. D. Bartholomay
W. E. Merrill
J. T. McGill
M. H. Fleming
G. Vallera
G. L. Hockaday
W. A. House
L. Gonzalez
J. Dodd
T. A. Denton
F. E. Wallace
N. J. Marquar
B. L. Watts
A. J. Popp
D. E. DeLoach

* The corporations which require disclosure pursuant to Rule 28.1 of the Rules of this Court, are listed App., *infra* 62a-70a. One of the petitioners, CSX Transportation, Inc., was formerly incorporated under the name Seaboard System Railroad, Inc. It changed its name on July 1, 1986.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. _____

BURLINGTON NORTHERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, BALTIMORE AND OHIO CHICAGO TERMINAL COMPANY, CHESAPEAKE AND OHIO RAILWAY COMPANY, and CSX TRANSPORTATION, INC.,

Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Burlington Northern Railroad Company ("Burlington Northern"), Union Pacific Railroad Company and Missouri Pacific Railroad Company (collectively "Union Pacific"), The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe"), Baltimore and Ohio Railroad Company ("B&O"), Baltimore and Ohio Chicago Terminal Company ("B&OCT"), Chesapeake and Ohio Railway Company ("C&O"), and CSX Transportation, Inc. ("CSXT") (hereinafter "the Railroads") hereby petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at —— F.2d —— (1986). The opinion of the district court (App., *infra*, 24a-45a) granting the Railroads' motion for a preliminary injunction is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1986 (App., *infra*, 48a). The order of the court of appeals denying rehearing was entered on July 8, 1986 (App., *infra*, 46a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case concerns the proper interpretation of certain sections of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 152, 152 First, Second and Seventh, 155 First, 156, 157, and 160, and certain sections of the Norris-LaGuardia Act, 29 U.S.C. §§ 104 and 113. Those statutory provisions and other related sections are reproduced in the Appendix, *infra*, at 50a. Those provisions must be interpreted in light of other statutes, including the Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4) and Section 11101(a) of the Interstate Commerce Act, 49 U.S.C. § 11101(a), which are also set forth in the Appendix.

STATEMENT

A. The Railway Labor Act.

The Railway Labor Act was passed in 1926, 44 Stat. 577, and amended in 1934, 48 Stat. 1185, to provide a comprehensive framework for the resolution of labor disputes in the railroad industry, in view of the importance of that industry to the commerce of the whole nation.[1]

[1] The RLA was amended in 1934, but the changes "related principally to the machinery for making the [statutory] procedures effective," *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R.R.*, 321 U.S. 50, 57-58 n.12 (1944), particularly with respect to arbitration of grievances and other "minor" disputes. See *Brotherhood of Locomotive Engineers* v. *Louisville & Nashville R.R.*, 373 U.S. 33, 36-37 (1963) (and cases cited therein); *Brotherhood of Railroad Trainmen* v. *Chicago River & Ind. R.R.*, 353 U.S. 30, 40 (1957). The RLA was amended again in 1936 to apply to the airline industry. See 49 Stat. 1189 (codified at 45 U.S.C. § 181 *et seq.*). The RLA was also amended in 1951, 64 Stat. 1238-1239 and 1966, 80 Stat. 208.

As the statute itself states, it is intended "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein," 45 U.S.C. § 151a(1); the "major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes.'" *Texas & N.O. RR.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548, 565 (1930).[2]

To that end, the Railway Labor Act prescribes detailed procedures for the peaceful resolution of "*all* disputes concerning rates of pay, rules, or working conditions," 45 U.S.C. § 151a(4) (emphasis added)—the entire universe of railway labor controversies. These have been categorized into "major" and "minor" disputes. See *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 722-23 (1945). Grievances and other disputes concerning the interpretation or application of existing collective bargaining agreements—so-called "minor" disputes—are decided by adjustment boards, whose decisions are binding on the parties. 45 U.S.C. § 153. See generally *Brotherhood of Rail-*

[2] This concern is amply demonstrated by the statute's legislative history. As one Representative argued, "Everybody recognizes the absolute importance of the smooth and continued functioning of the railway transportation system. Everybody knows that if that system should be paralyzed even for one week . . . national calamity" would result. 67 Cong. Rec. 4568 (1926) (remarks of Rep. Merritt). See also *id.* at 4519 (remarks of Rep. Barkley). One of the union spokesmen who participated in drafting the Act stated that the RLA "provides a machinery to promote peace, not a manual of war." *Hearings on H.R. 7180*, 69th Cong., 1st Sess. 191 (1926) (statement of D. B. Robertson, President, Brotherhood of Locomotive Firemen & Enginemen).

road Trainmen v. *Chicago River & Ind. R.R.*, 353 U.S. 30 (1957); *Brotherhood of Locomotive Engineers* v. *Louisville & Nashville R.R.*, 373 U.S. 33 (1963). Disputes over the formation of or proposed changes in agreements concerning rates of pay, rules, or working conditions—so-called "major" disputes—must be handled by following detailed and specific steps prescribed by the statute, including negotiation, mediation, arbitration and conciliation. 45 U.S.C. §§ 155-160.

In *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969), this Court described as follows the Act's "detailed framework to facilitate the voluntary settlement of major disputes":

> "A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President,' who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10.[3]

[3] The recommendations of the National Mediation Board or a Presidential emergency board are not binding on the parties, however, and in the absence of subsequent agreement by the parties to the dispute, the parties are free to resort to self-help against each other (including a strike by the union). *Jacksonville Terminal*, *supra*, 394 U.S. at 378-79 & n.13 (and cases and authorities cited therein).

These steps "are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Brotherhood of Railway & Steamship Clerks* v. *Florida East Coast R.R.*, 384 U.S. 238, 246 (1966). Neither of the parties to a major dispute may resort to any self-help against the other until all of the procedures have been exhausted. *Brotherhood of Locomotive Engineers* v. *B. & O. R.R.*, 372 U.S. 284, 291 (1963).

The RLA does not contain any explicit limitations on the forms of self help to which carriers or unions may resort after they have exhausted the RLA's dispute-resolution procedures. This Court has looked to the underlying purposes and "spirit of the Railway Labor Act" in defining limitations on self help. *Florida East Coast*, *supra*, 384 U.S. at 246-48.

B. The Facts Of This Case.

1. This case arises out of a dispute under the Railway Labor Act between Respondent Brotherhood of Maintenance of Way Employees ("BMWE") and two small railroads located in Maine, the Maine Central Railroad ("MEC") and its subsidiary, the Portland Terminal Company ("PT"). App., *infra*, 26a. The dispute involves wages, hours and working conditions of the 110 members of BMWE employed by MEC/PT. *Id.* This dispute is considered a "major" one under the RLA. See pages 3-4, *supra*. After the BMWE exhausted the RLA's procedures for resolution of a major dispute, it instituted a lawful strike against MEC/PT on March 3, 1986.

Late in March, BMWE extended the picketing to two other small railroads owned by Guilford Transportation Industries, Inc., MEC's parent company.[4] App., *infra*,

[4] Guilford filed a motion to enjoin the picketing, but its motion was denied on April 2, 1986. *BMWE* v. *Guilford Industries, Inc.*, No. 86-0084-P (D. Me. April 2, 1986).

26a. Subsequently, BMWE attempted to extend its picketing beyond the corporate affiliates of MEC/PT to other eastern railroads. These railroads obtained preliminary orders enjoining such picketing.[5]

On April 8, 1986, the President of the BMWE sent a telegram to the Association of American Railroads threatening to extend picketing and/or strike activity against all of the nation's railroads, including petitioners, in an effort to "shut down the nation's railroad system." App. *infra*, 5a. The purported basis for the BMWE's threatened picketing was the alleged participation of the nation's railroads in a "mutual aid arrangement" designed to provide money, personnel and material assistance to the MEC/PT.[6] Consistent with its threat, on April 11, 1986, the BMWE began picketing Union Pacific in Los Angeles—thousands of miles from the site of the primary dispute.

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[5] *Consolidated Rail Corp.* v. *BMWE*, No. 86-0318T (W.D.N.Y. Apr. 6, 1986), *vacated*, No. 86-7289 (2d Cir. June 5, 1986); *Richmond, Fredericksburg & Potomac R.R* v. *BMWE*, No. 86-3544 (4th Cir. Apr. 12, 1986) (Judge Widener sitting alone by reason of the emergency nature of the proceedings), *vacated by panel*, May 5, 1986.

[6] In response to this telegram, petitioners (with the exception of Burlington Northern) along with other railroads sought a temporary restraining order from the United States District Court for the District of Columbia enjoining secondary picketing by the BMWE. *BMWE* v. *Association of American Railroads*, No. 86-951. On April 10, 1986, that court denied the motion on the ground that, in the absence of any picketing, the railroads had failed to establish a serious threat of irreparable harm. App., *infra*, 3a. Union Pacific, Santa Fe and Chessie all voluntarily withdrew from the case and proceeded in the Northern District of Illinois. Subsequently, the District Court for the District of Columbia declined to issue a preliminary injunction. *BMWE* v. *Association of American Railroads* (D.D.C. Apr. 24, 1986), *affirmed sub nom. Central Vermont Ry.* v. *BMWE*, No. 86-5245 (D.C. Cir. June 27, 1986).

2. Petitioners operate railroads throughout the United States, but clearly "are strangers to the dispute between the Union and the Maine Central." App., *infra*, 5a. Burlington Northern, Union Pacific, and the Santa Fe all operate in the west and each has its easternmost terminus in the Chicago area. B&O, B&OCT, C&O and CSXT do operate in the east, but none of the petitioners has any connections or direct interchange of traffic with MEC or PT.

Burlington Northern filed suit on April 9, 1986, in the United States District Court for the Northern District of Illinois and the same day obtained a temporary restraining order enjoining secondary picketing by respondents. The other petitioner railroads filed complaints on April 10 and 11, and also secured temporary restraining orders. The suits were consolidated for a hearing, and on April 23 the district court issued a preliminary injunction against BMWE's picketing. App., *infra*, 24a-45a.

The district court first considered the applicability of Section 1 of Norris-LaGuardia, 29 U.S.C. § 101, which generally precludes federal courts from issuing an injunction "in a case involving or growing out of a labor dispute." Relying upon *Ashley, Drew & Northern Ry. Co.* v. *United Transportation Union*, 625 F.2d 1357, 1363 (8th Cir. 1980), and *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R.*, 362 F.2d 649, 654-55 (5th Cir.), *aff'd by an equally divided court*, 385 U.S. 20 (1966), the district court held that, when a secondary employer seeks to have a union's activity enjoined by a federal court, the case "involves or grows out of a labor dispute" within the meaning of Norris-LaGuardia *only* when the secondary employer is " 'substantially aligned' " in some material way with the railroad with which the union has its primary dispute. . . ." App., *infra*, 31a. Finding that "none of the plaintiff railroads participate in any alleged 'mutual aid arrangement' with MEC/PT" (App., *infra*, 27a) and that none of the petitioners di-

rectly exchanged traffic or connected with MEC/PT (*id.* at 36a), the district court found that petitioners were not substantially aligned with MEC/PT.[7]

Having concluded that it had jurisdiction to enter an injunction, the district court balanced the relative severity of the harms that would befall the parties if an injunction were granted or, alternatively, were denied and also considered petitioners' likelihood of success on the merits. (App., *infra*, 44a.) The district court found that petitioners had satisfied their burden with respect to these issues and granted a preliminary injunction concluding (*ibid.*):

> "Based upon the threatened disruption of the nation's rail service, the Court finds that the public interest weighs heavily in favor of the issuance of the preliminary injunction, which will ensure the continued interstate transportation of vital goods."

3. Following entry of the preliminary injunction by the district court, respondents filed notices of appeal to the court of appeals and a petition for a writ of certiorari before judgment in this Court. In its petition to this Court (at 13), BMWE stated that "this case presents an excellent example . . . of the need for this Court to resolve whether the Norris-LaGuardia Act deprives the

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[7] The district court also held that the case did not "grow out of" a labor dispute because the BMWE was applying pressure designed to induce petitioners to violate their common carrier obligation under the Interstate Commerce Act (49 U.S.C. § 11101(a)) to provide "safe and adequate service" without discrimination (App., *infra*, 38a-40a). The district court further concluded that it had jurisdiction to issue an injunction in order to "vindicate the processes of the Railway Labor Act." *Id.* at 40a. The court characterized the question whether the BMWE could picket petitioners as a "major dispute" subject to conciliation under the RLA and that the court therefore was empowered to enjoin the picketing pending exhaustion of this process. *Id.* at 42a.

federal courts of jurisdiction to enjoin secondary picketing in a rail labor dispute." [8]

Prior to this Court's consideration of the petition for certiorari before judgment, the court of appeals heard argument (on May 30, 1986), and, on June 4, 1986, issued a decision reversing the district court's judgment.[9] The decision of the court of appeals rests essentially on two grounds.

First, the court of appeals concluded that the Norris-LaGuardia Act removed the district court's jurisdiction over the Railroads' complaints because the threatened secondary picketing "involves or grows out of a labor dispute." App., *infra*, 20a-23a. In so holding, the court of appeals expressly declined to follow the decisions of the Eighth (*Ashley, Drew*) and Fifth (*Atlantic Coast Line*) Circuits, which the district court had relied upon in rejecting respondents' jurisdictional challenge under Norris-LaGuardia. App., *infra*, at 20a.

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[8] In their brief in opposition to BMWE's petition for a writ of certiorari before judgment, petitioners stated (Opp. at 2, 3-4):

> "[T]he question presented here is of critical importance to the national economy and should be decided by this Court regardless of whether the primary labor dispute is resolved.
>
> * * * *
>
> "While the issue presented here is clearly important and this case is the appropriate vehicle for the resolution of that issue, the circumstances here do not justify invocation of this court's extraordinary power to review cases in the courts of appeals prior to judgment . . . . This Court can and should resolve this case *after* the Seventh Circuit has rendered its decision."

[9] In view of the decision of the court of appeals, on June 12, 1986, BMWE stipulated to the dismissal of its petition for certiorari before judgment. In so stipulating, the union stated that it would "support the issuance of a writ of certiorari to review [the judgment of the Seventh Circuit] for the reasons set forth in the petition which is being dismissed by this stipulation." Stipulation of Dismissal at 1.

Second, the court of appeals held that the RLA does not prohibit secondary picketing of any kind. App., *infra*, 12a-17a. The court acknowledged that "the interaction between the Railway Labor Act and the Norris-LaGuardia Act is untidy" (*id.* at 10a). The court also recognized that its holding would permit secondary picketing of railroads, even though a principal purpose of the RLA was to "avoid any interruption to commerce or to the operation of any carrier engaged therein" (*id.* at 14a), and that such secondary picketing "has been banned in every other industry" (*id.* at 12a). Nonetheless, the court of appeals held that the RLA did not preclude secondary picketing in the railway industry because Congress' "goal" in enacting thhe RLA "is not itself a rule of law." *Id.* at 14a.

In support of its interpretation of the RLA, the court of appeals relied heavily upon this Court's decision in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal*, 394 U.S. 369 (1969), and interpreted that decision as holding that the RLA "does not forbid secondary picketing." App., *infra*, 17a. Further, the court of appeals held that, even if the RLA rendered secondary picketing unlawful, Norris-LaGuardia still precludes the federal courts from issuing an injunction to prevent such a violation. *Id.* at 17a-19a.[10]

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[10] On May 16, 1986, President Reagan issued Executive Order No. 12557, convening an Emergency Board under Section 10 of the RLA, 45 U.S.C. § 160. The President determined that the disputes between the BMWE and MEC/PT "threaten substantially to interrupt interstate commerce to a degree such as to deprive a section of the country of essential transportation services." Pursuant to the President's Order, the Emergency Board investigated the dispute and issued a report dated June 20, 1986, recommending that the BMWE accept the offer made by MEC/PT prior to commencement of the strike, and further that MEC/PT grant future wage increases and benefits similar to those reached in negotiations with national carriers. During the pendency of the Board's investigation and for 30 days following the issuance of the report, "no change" is permitted "in the conditions out of which the dispute arose." However, as the court of appeals recognized, unless the primary dispute is settled before July 20 (the expiration date of the Presidential Order), "the parties will be at each others' throats again." App., *infra*, 4a.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals permits a railway union involved in a dispute in Maine to picket railroads across the country in an effort to "shut down the nation's railroad system." App., *infra*, 5a. Under the decision of the court of appeals, the burden of respondents' dispute with "a tiny railroad in New England" will be borne not only by petitioners, but also by the nation's consumers of everything from food to electricity. This case thus plainly raises issues of substantial importance to the national economy. As respondents have acknowledged, they are issues as to which there are inter-circuit conflicts, which must be resolved by this Court.[11]

1. The Norris-LaGuardia Act generally removes the jurisdiction of federal courts to issue injunctive relief in "a case involving or growing out of a labor dispute." 29 U.S.C. § 101. Applicability of the Act's anti-injunction proscription therefore depends on whether this was a case "involving or growing out of a labor dispute" within the meaning of the Act.

Section 13(c) of the Act, 29 U.S.C. § 113(c), defines "labor dispute" as "any controversy" concerning either

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[11] Three circuits in addition to the Seventh have held that federal courts lack the power to enjoin the BMWE from engaging in secondary picketing following its strike against MEC/PT. *Consolidated Rail Corp.* v. *BMWE*, No. 86-7289 (2nd Cir., June 5, 1986); *Central Vermont Ry.* v. *BMWE*, No. 86-5245 (D.C. Cir. June 27, 1986); *Richmond, Fredericksburg & Potomac R.R.* v. *BMWE*, No. 86-3544 (4th Cir. July 12, 1986). The Fourth, Seventh and D.C. Circuits explicitly acknowledged that their opinions conflicted with decisions of the Eighth and Fifth Circuits. See *Ashley, Drew & Northern Ry.* v. *United Transportation Union*, 625 F.2d 1357 (8th Cir. 1980); *Brotherhood of Railway and Steamship Clerks* v. *Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir.), *aff'd by equally divided court*, 385 U.S. 20 (1966). Thus, the conflict over this fundamental issue of national transportation policy extends to at least six circuits.

"terms or conditions of employment" or "representation" of persons in negotiating "terms or conditions of employment." A "labor dispute" exists under Section 13(c) "regardless of whether or not the disputants stand in the proximate relation of employer and employee." Further, section 13(a) of the Act, 29 U.S.C. § 113(a), provides that a "case shall be held to involve or grow out of a labor dispute when the case involves persons who are engaged in the same industry. . . ."

The court of appeals read the expansive language of Norris-LaGuardia literally and ruled that the present case is one involving or arising out of a labor dispute between respondent BMWE and MEC/PT. In so holding, the court of appeals expressly declined to follow the decisions in *Ashley, Drew & Northern Ry.* v. *United Transportation Union*, 625 F.2d 1357 (8th Cir. 1980), and *Brotherhood of Railway and Steamship Clerks* v. *Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir.), *aff'd by equally divided court*, 385 U.S. 20 (1966).[12]

In *Ashley, Drew, supra*, 625 F.2d at 1365, the court held that "[a]lthough the plain language of a statute is often controlling, it is impermissible to follow a literal reading that engenders absurd consequences where there is an alternative interpretation that reasonably effects the statute's purpose." After reviewing the background of the Norris-LaGuardia Act, the Eighth Circuit concluded (*id.* at 1366) "that section 13(a) was meant to preclude injunctive interference with bargaining or organizing on an industry-wide or craft-wide basis" and "was not meant to extend an anti-injunctive shield for union activities beyond the place where the union's interests in a labor dispute cease." Accordingly, the Eighth Circuit held, consistent with the Fifth Circuit's decision in *Atlantic Coast Line*, that Norris-LaGuardia only applies where the picketing victim is "substantially aligned" with

[12] Instead, the court of appeals followed the decision of the Ninth Circuit in *Smith's Management Corp.* v. *IBEW, Local 357*, 737 F.2d 788 (9th Cir. 1984), which did not involve a railroad dispute.

the primary employer. *Id.* at 1367. When this Court considered the issue in *Atlantic Coast Line*—the only time this Court has done so—it split 4-4. See 385 U.S. 20 (1966).

From the beginning of railroad labor regulation, Congress has made plain its intent that the nation's railroad service, which is so critical to shippers and consumers throughout the country, not be disrupted by labor disputes. It is for this purpose that Congress created elaborate dispute-resolution mechanisms in the RLA to make it quite difficult for the parties to a labor dispute to engage in self-help. Under these circumstances, the provisions of Norris-LaGuardia plainly cannot be read in isolation and literally applied without reference to the legislative background of that Act and also against the background of the RLA, which had been enacted just six years earlier. As this court has held:

> "[T]he Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved."

Brotherhood of R. Trainmen v. *Chicago River & I.R.*, 353 U.S. 30, 40 (1957).

The result sought here by respondents is absurd and could not have been intended by Congress. Indeed, it is totally contrary to the expressed purpose of the RLA. With respect to the primary dispute with MEC/PT, respondents were required under the Act to undergo many months of mediation and negotiation before a lawful work stoppage could occur; yet, under the decision below, neutral secondary carriers (including those who do not even directly interchange traffic with MEC/PT) are subject to being shut down without any notice or any mechanism for resolving the dispute before the union engages in self-help.

Petitioners submit that the district court was correct in holding that the "substantial alignment" test "repre-

sents a fair attempt by the courts to reconcile the Norris-LaGuardia Act's anti-injunction provisions with the national interest in steady and efficient transportation of goods by rail." App., *infra*, 38a. In any event, the decision of the court of appeals in this case plainly conflicts with the decisions in *Ashley, Drew* and *Atlantic Coast Line*. This inter-circuit conflict over the proper interpretation of one of the fundamental statutes regulating labor relations, which has direct implications of critical importance to the national economy, requires resolution by this Court.

2a. In holding that the district court lacked jurisdiction to issue an injunction against respondents' secondary picketing, the court of appeals held that nothing in the Railway Labor Act prohibited secondary picketing and that, even if it did, the Norris-LaGuardia Act nevertheless precludes an injunction to remedy the violation. In reaching this result, the court below misinterpreted both the Railway Labor Act and its relationship with the Norris-LaGuardia Act, and the court misapplied this Court's decision in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969), in a way that directly conflicts with decisions of other courts of appeals.

The court of appeals has cut the heart out of the Railway Labor Act. Congress selected railroads as the first and only industry to be regulated by a separate statute because Congress recognized that rail strikes have an impact on the national economy unmatched by strikes in any other industry. Thus, a separate labor statute was needed for railroads (and later airlines) in order to *strengthen* the protection against strikes. Yet, under the court of appeals' opinion, Congress is assumed to have intended secondary boycotts to be used only against these industries. The weapon most effective in paralyzing an industry would be available only in the industries where Congress sought to make paralyzing strikes less likely. This result Congress could not have intended.

In fact, Congress made its intent in this respect quite clear. Before a union can strike a railroad it must first exhaust the elaborate procedures of the RLA, which are designed to prevent strikes. Yet, the Act makes no provision for procedures in the case of railroads with which the union has no grievance. The clear implication is that secondary picketing of railroads has always been unlawful. The alternative interpretation—that the statutory prerequisites to a union's self-help would be available to primary employers but not to secondary ones—is so far removed from any possible Congressional purpose that it must be rejected for that reason alone. It would result in the anomaly that railroad employers such as the petitioners can be picketed without having available to them any of the protections of the Act.

Although the Railway Labor Act is silent with respect to secondary picketing, secondary conduct such as that engaged in by respondent in this case would unquestionably be illegal under Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4) ("NLRA"), if that Act covered railway employees. As a result of the Taft-Hartley Amendments, which prohibited certain secondary activities, picketing around the site of a secondary employer's business is plainly illegal secondary conduct. *Local 761, International Union of Electrical Workers* v. *NLRB*, 366 U.S. 667, 675 (1961); *Wadsworth Building Co.*, 81 N.L.R.B. 802, 805. Thus, if BMWE represented employees in any industries other than these specially sensitive industries, the picketing against petitioners would be illegal under the NLRA.

What makes this disparate treatment wholly unjustifiable is that this Court has previously held that it is perfectly appropriate to rely upon "the NLRA for assistance in construing the Railway Labor Act." *Jacksonville Terminal*, 394 U.S. at 383. See *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192, 200-201 (1944); *Railroad Trainmen* v. *Toledo, P. & W. R.R. Co.*, 321 U.S. 50, 61 n.18

(1944). In manifest disregard of this sensible rule of construction, the court of appeals simply "put to one side" all developments in labor law since 1932, including the Taft-Hartley Amendments, and thereby completely blinded itself to the best evidence of what Congress would have intended in this case.

The court's rationale for ignoring the general purpose of the Railway Labor Act was as follows:

> When Congress writes the rule, courts may not transmute the statute into the other form by inventing new rules to pursue the goal Congress had in mind.

App., *infra*, 15a. No one can quarrel with the court of appeals' statement, but it plainly does not apply here. There is no "rule" authorizing secondary picketing under the Railway Labor Act, either in the language or history of the Act, and the court below acknowledged as much. *Id.* at 11a (Railway Labor Act "is silent on what happens" if a major dispute is not resolved.) The principal purpose of the RLA was to preclude strikes in the railroad industry. The only exception Congress provided was where the parties to the major dispute have exhausted the statutory prerequisites. In the name of "judicial restraint," the court of appeals has in reality created a new exception—one which Congress did not itself create or intend.

It is particularly inappropriate for the courts to discriminate against the railroads by not prohibiting secondary picketing in that industry when it is clear that Congress' dominant concern in enacting the Railway Labor Act was to avoid nationwide rail strikes that could paralyze interstate commerce and literally jeopardize the health and welfare of the nation. 45 U.S.C. § 151a (primary purpose to avoid "any interruption to commerce or to the operation of any carrier engaged therein"); H.R. Rep. No. 328, 69th Cong., 1st Sess. 1 (1926). As Congress recognized when it enacted Section 8(b)(4) of

the NLRA declaring secondary picketing unlawful, there is a great potential for strikes to have widespread economic effects if secondary picketing is permitted. Indeed, this case is an obvious example of the potential seriousness of the problem.

But, instead of seeking to further Congress' overall objectives under the Railway Labor Act by enjoining the secondary picketing employed in this case, the court below dismissed that objective on the ground that "this goal is not itself a rule of law." This assertion conflicts directly with prior decisions of this Court that have construed the Railway Labor Act in light of its general purposes. See *Brotherhood of Railway & Steamship Clerks* v. *Florida East Coast R.R.*, 384 U.S. 238, 247 (1966) (recognizing limits on legitimate self-help rights in light of "[t]he spirit of the Railway Labor Act"); *Steele* v. *Louisville & N. R. Co.*, 323 U.S. at 202-203.[13] If the Court below had followed those decisions, it would have held that secondary picketing, such as that undertaken here, is illegal under the RLA.

While it is true, as the court of appeals observed, that "[c]ourts must abide by the legislative choice," there is no evidence that Congress *chose* to permit secondary picketing in the circumstances of this case. In fact, what evidence there is strongly indicates that Congress did not choose to permit secondary picketing against railroads. The court of appeals correctly acknowledged that at the time of the Railway Labor Act secondary picketing was clearly unlawful in the railroad industry. See, *e.g.*, *To-*

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[13] The court below observed that it "cannot say that a prohibition against secondary picketing will lead to less strife; maybe it will lead to more. . . ." App., *infra*, 14a. It is, however, indisputable that secondary picketing will increase the likelihood of severe, nationwide strikes. This case well illustrates that fact. Moreover, during the 60 years that the RLA was understood by all as prohibiting secondary picketing there is not a shred of evidence that the unions' inability to engage in secondary activities increased the likelihood that they would be forced to engage in a primary strike.

ledo, A. A. & N. M. Ry. Co. v. *Pennsylvania Co.*, 54 Fed. 730 (N.D. Ohio 1893); *Thomas* v. *Cincinnati, N.O. & T.P. Ry. Co.*, 62 Fed. 803 (S.D. Ohio 1894); and *Southern Calif. Ry. Co.* v. *Rutherford*, 62 F. 796, 797 (S.D. Cal. 1894). It is incredible to assume that Congress, through its silence, intended in the RLA suddenly to legalize such plainly harmful strikes. It is much more reasonable to infer that pure secondary strikes remained illegal in 1926 after Congress enacted the RLA. After all, its purpose was to avoid, if at all possible, potentially crippling strikes. If that inference is correct, then BMWE's picketing of petitioners must be unlawful today because nothing has happened since 1926 to legalize respondent's pure secondary activities. To the contrary, post-1926 developments indicate strongly that this strike is unlawful.

b. The court of appeals "stilled" its "doubts" about the legality of secondary picketing under the RLA by reading this Court's opinion in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal* as holding that all secondary picketing is permissible under the Act. This interpretation is manifestly wrong. *Jacksonville Terminal* dealt with a fundamentally different issue and did not reach the issue here.

In *Jacksonville Terminal*, the union engaged in a primary strike with the railroad and also picketed a terminal company that constituted "an integral part of the day-to-day operations of the [railroad]." 394 U.S. at 373, quoting *Railroad Trainmen* v. *Atlantic Coast Line R.R.*, 362 F.2d 649, 651 (1966). The terminal company sought and obtained a state court injunction against picketing at locations other than the gate at the Terminal used by the employees of the primary railroad employer. This Court, in a 4-3 decision, analyzed the issue by reference to the law of "common situs" picketing in the NLRA. The Court observed that, "[i]f the common situs rules were applied to the facts of the case . . . , the state injunction might well be found to forbid petitioners from engaging in conduct protected by the National Labor Relations Act." 394 U.S. at 389-390. The Court nevertheless refused to undertake in that case to "mark out" what secondary activity is lawful or unlawful under the RLA or the NLRA and simply held that all picketing "must be deemed conduct protected against *state* proscription." *Id.* at 391, 393 (emphasis added). The Court did not hold that all secondary picketing of railroads by rail unions is lawful as a matter of federal law; instead, it held that "[t]he determination of the permissible range of self-help 'cannot be left to the laws of the many States, for it would be fatal to the goals of the Act' . . . 'The needs of the subject matter manifestly call for uniformity.'" 394 U.S. at 381, *quoting International Association of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 691-692 (1963).

The expansive reading by the court of appeals of the holding in *Jacksonville Terminal* is not only inconsistent with the plain language of that opinion, but it conflicts with decisions of other circuits which have held that this Court did not conclude that the RLA permits all secondary picketing as a matter of federal law. In *In re Brotherhood of Railway, Airline and Steamship Clerks*, 605 F.2d 1073 (1979), the Eighth Circuit remanded for a factual inquiry into the relationship between the primary and secondary employer to determine whether the picketing at issue there violated the RLA. The Court interpreted *Jacksonville Terminal* as recognizing that under the RLA there is both legitimate and banned secondary activity. *Id.* at 1075. See *Ashley, Drew & N. Ry.* v. *United Transportation Union*, 625 F.2d at 1370 n.25 ("*Jacksonville Terminal* held secondary activity by a RLA union immune from state injunctive interference. Its reasoning does not support a like immunity at the federal level.")

Similarly, the Second Circuit in *Marriott In-Flight Services* v. *Local 504*, 557 F.2d 295, 299 (2d Cir. 1977),

analyzed the *Jacksonville Terminal* decision and concluded, contrary to the decision below, that this Court "explicitly did not decide whether the activity at stake was 'primary' or 'secondary,' or whether it was protected by the RLA." [14] The Seventh Circuit's unduly broad reading of *Jacksonville Terminal* as immunizing all secondary activities under the RLA raises a fundamental issue under that statute which conflicts with decisions in other circuits and, if left unreviewed, will have a tremendous, adverse impact on the railroad industry.

c. The court below argued that, even if respondent's secondary picketing violated the RLA, the district court still would lack jurisdiction to enjoin that conduct because of the Norris-LaGuardia Act. App., *infra*, 17a-19a. The court asserted that Norris-LaGuardia contains no exception for situations where the union is violating some other law, such as the RLA. Elsewhere, we argue that Norris-LaGuardia simply does not extend to this case. See pages 11-13. Assuming that it does, however, the court of appeals clearly erred by refusing to interpret Norris-LaGuardia's protections as limited by the specific mandate of the RLA prohibiting secondary picketing of neutral railroads.

In a series of cases, this Court has held that violations of the RLA support a federal court's issuance of an injunction, notwithstanding the restrictions on the court's equity power imposed by Norris-LaGuardia. See, *e.g.*, *Chicago & N.W. Ry.* v. *United Transportation Union*, 402 U.S. 570 (1971); *Brotherhood of Locomotive Engineers* v. *Louisville & Nashville R.R.*, 373 U.S. 33 (1963); *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R.R.*, 353 U.S. 30 (1957). The court below interpreted these cases as permitting an injunction only when the negotiation or mediation processes of the RLA have

[14] But see *Consolidated Rail Corp.* v. *BMWE*, No. 86-7289, slip op. at 5 (2d Cir., June 5, 1986); *Central Vermont Ry.* v. *BMWE*, No. 86-5245, slip op. at 4, n.2 (D.C. Cir. June 27, 1986).

not been completed; "[o]nce these processes are over, and a strike lawfully has begun, the Norris-LaGuardia Act forbids resort to injunctions." App., *infra*, 19a. Not surprisingly, the court of appeals cites no case for this specific proposition. This is because this Court has never drawn that distinction.

The court of appeals purported to derive its interpretation from this Court's decisions in *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R.R.*, 353 U.S. 30, 42 n.24 (1957); and *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W.R.R.*, 321 U.S. 50 (1944). But neither of these cases support the holding below.[15]

In the *Chicago River* case, the Court held that "the District Court has jurisdiction and power to issue necessary injunctive orders [to *enforce compliance with the requirements of the Railway Labor Act*] notwithstanding the provisions of the Norris-LaGuardia Act." 353 U.S. at 42 (brackets in original), quoting, *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774 (1952). See *Virginia Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515, 563 (1937). Thus, nothing in that decision restricts the availability of injunctive relief to violations of the mediation requirements in the RLA.

Under this Court's decisions, the proper analysis in reconciling the Railway Labor Act and the Norris-La Guardia Act is based upon the nature of the duty created by the RLA which has been breached by one of the parties to the labor dispute and upon the need for an injunction to enforce rights protected by the RLA. In *Chicago & N.W. Ry.*, the Court held that a proper accommodation of Norris-LaGuardia and the RLA permitted an injunc-

[15] In the *Toledo* case, as the court below acknowledged, the employer had failed to satisfy the conditions in Section 8 of the Norris-LaGuardia Act for obtaining an injunction. Thus, the Court had no occasion to decide generally what violations of the RLA can properly be remedied by an injunction.

tion to issue "where that remedy is the only practical, effective means of enforcing" the statutory duty that has been breached. 402 U.S. at 570. In that case the Court permitted an injunction to issue to remedy the union's breach of its duty to bargain in good faith. The Court upheld the injunction even though the union's duty was admittedly vague and the availability of an injunction would significantly interfere with the union's ability to resort to self-help. 402 U.S. at 570. The injunction was nevertheless appropriate because the Court found that good faith bargaining is an important duty under the RLA.

If we are correct that the RLA imposes a duty upon a union not to engage in secondary picketing against a purely neutral employer, then an injunction is clearly the only reasonable method for remedying the breach of that duty in the circumstances of this case. The injury that a work stoppage will cause the railroad industry nationwide could never be recompensed by respondent. Moreover, an injunction here will not interfere with the union's resort to self help against the primary employer. Under this Court's analysis in *Chicago & N.W. Ry.*, Norris-LaGuardia is no bar to the issuance of an injunction here. Accordingly, the court of appeals' failure to apply the Court's decisions reconciling the RLA with the Norris-LaGuardia Act clearly warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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July 15, 1986

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-1666

BURLINGTON NORTHERN RAILROAD COMPANY, *et al.*,
Plaintiffs-Appellees,

v.

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division

Nos. 86 C 2442 et al.—James F. Holderman, *Judge*

ARGUED MAY 30, 1986—DECIDED JUNE 4, 1986

Before FLAUM and EASTERBROOK, *Circuit Judges,* and SWYGERT, *Senior Circuit Judge.*

EASTERBROOK, *Circuit Judge.* A dispute between a tiny railroad in New England and one of its unions threatens to disrupt rail transportation throughout the United States. Concluding that any legal system that allows this to occur would deserve Mr. Bumble's condemnation, the district court issued an injunction against

the union's picketing. The railroads defend the injunction on the principal ground that Congress could not have meant railroads, alone among America's principal industries, to be exposed to secondary picketing. We conclude, however, that Congress provided just this. Employees of railroads are not covered by the National Labor Relations Act, which prohibits secondary picketing and allows the National Labor Relations Board to seek injunctions. See 29 U.S.C. §§ 152(2), 152(3), 158(b)(4), 160(*l*). The Railway Labor Act, 45 U.S.C. §§ 151-63, does not prohibit secondary pressures, and this dispute therefore is governed by the Norris-LaGuardia Act, 29 U.S.C. §§ 101-15, which forbids federal courts to enjoin peaceful picketing growing out of labor disputes.

I

The Brotherhood of Maintenance of Way Employees (the Union) represents some employees of the Maine Central Railroad and the Portland Terminal Company (collectively the Maine Central). Their last collective bargaining agreement expired in 1984. This failure to agree about wages and conditions of employment is a "major dispute" in the parlance of the Railway Labor Act, and it brought into play a sequence of steps starting with a conference, see 45 U.S.C. § 152 Second, and progressing through hearings before the National Mediation Board, see 45 U.S.C. § 155 First (b). See also 45 U.S.C. §§ 156, 157, 160. By March 1986 the parties had exhausted the statutory procedures, and the members of the Union went on strike on March 3. This is a lawful strike. Late in March the Union extended the strike to the Delaware & Hudson Railroad and the Boston & Maine Railroad, which, like the Maine Central, are subsidiaries of Guilford Transportation Industries, Inc. Guilford sought but did not get an injunction against the extension of the strike. *BMWE v. Guilford Industries, Inc.*, No. 86-0084-P (D. Me. Apr. 2, 1986).

Supervisors continued to operate at least some of the services of the four Guilford companies. Although the Guilford companies collectively operate more than 4000 miles of track, reaching from Buffalo to Portland, Maine, and from Montreal to Washington, D.C., they are small as railroads go. Much of their traffic is carried in part by some other railroad on a joint or through route. The Union therefore decided in early April to put pressure on the Guilford lines by choking off their revenue from traffic they interchange with other railroads. The Union extended its picketing to railroads in the east that interchange significant volumes of traffic with the Guilford lines. This was quickly enjoined. *Consolidated Rail Corp. v. BMWE*, Civ. 86-0318 (W.D.N.Y. Apr. 6, 1986), stayed pending appeal, No. 86-0318 (2d Cir. May 15, 1986); *Richmond, Fredericksburg & Potomac R.R. v. BMWE*, No. 86-3544 (4th Cir. Apr. 12, 1986) (Widener, J.), vacated by panel, May 5, 1986, *cert. pending*, No. 85-1792. On April 8 the Union sent a telegram to the Association of American Railroads, threatening to picket every railroad in the country. This produced a panicked series of requests for relief that have been concentrated in Chicago and the District of Columbia. In *BMWE v. Association of American Railroads* and two consolidated cases, the district court entered a temporary restraining order on April 13 but on April 25 declined to issue a preliminary injunction. Civ. No. 86-0951 (D.D.C. Apr. 25, 1986), affirmed under the name *Central Vermont Ry. v. BMWE*, No. 86-5245 (D.C. Cir. May 14, 1986) (memorandum with notation that an opinion would follow).

The railroads' longest-lived success has been in Chicago. The Burlington Northern filed this suit on April 9 and obtained a temporary restraining order from Judge Holderman the same day. The Missouri Pacific; Union Pacific; Atchison, Topeka & Santa Fe; Baltimore & Ohio; Baltimore & Chicago Terminal; Chesapeake & Ohio; and Seaboard System railroads filed suits in Chi-

cago immediately, and Chief Judge McGarr, as the emergency judge, issued further TROs. All of the suits were consolidated before Judge Holderman, who held a hearing and on April 23 entered a preliminary injunction against the Union's picketing.

The dispute has led to still more proceedings under the Railway Labor Act. On May 16 President Reagan issued Executive Order No. 12557, convening an Emergency Board under 45 U.S.C. § 160. The President determined that the disputes between the Union and the Maine Central "threaten substantially to interrupt interstate commerce to a degree such as to deprive a section of the country of essential transportation services." The Emergency Board must investigate the dispute and issue its report within 30 days. In the meantime, and "for thirty days after [the] board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose." The Union interprets this language of § 160 as requiring the Maine Central to restore the status quo before the strike and to resume bargaining; the members of the Union are back at work and represent that so long as the Maine Central restores the pre-strike conditions they will stay at work. (While the Union's members are on the job at the Maine Central, they have no desire to picket the Burlington Northern and the other plaintiffs.) The Maine Central may have a different view of § 160, and there may be further litigation concerning the Union's power to resume its strike before July 15, when the statutory period ends. The Executive Order does not make this case moot. The substantive dispute between the Union and the Maine Central continues, and unless it is settled by negotiations or resolved by legislation (a frequent ending for railroad strikes), the parties will be at each others' throats again on July 15. It remains necessary to decide whether the district court was entitled to issue an injunction.

II

The eight railroads that are plaintiffs here (collectively the Railroads) are strangers to the dispute between the Union and the Maine Central. They cannot compel the Maine Central to meet the Union's demands or require the Union to be satisfied with the Maine Central's offer. The Union's picketing of the Railroads is therefore "secondary" activity, as the Union concedes. The Union hopes that the employees of other railroads will honor its picket lines, shut down the nation's railroad system, dry up the Guilford lines' source of traffic, and put pressure on Guilford to require Maine Central to cave in to the Union's requirements. The district court assumed that it is unlawful for the Union to apply economic pressure on "neutral" railroads. It did not identify the source of the legal rule forbidding secondary picketing. The Railroads maintain that the Railway Labor Act itself is the source of the rule; we return to this claim in Part IV. The principal obstacle to relief is § 1 of the Norris-LaGuardia Act, 29 U.S.C. § 101, which states that "[n]o court of the United States . . . shall have jurisdiction to issue any . . . injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter". Section 4, 29 U.S.C. § 104, repeats the command of § 1, stating that no court has jurisdiction to enjoin anyone "interested in such [labor] dispute . . . from doing, whether singly or in concert, any of the following acts: . . . (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence". The Union's pickets at the Railroads' places of work are "giving publicity to . . . [a] labor dispute . . . by patrolling, or by any other method not involving fraud or violence". The Norris-LaGuardia Act does not contain any other provision allowing secondary picketing to be enjoined; indeed, the elimination

of injunctive restraints against secondary picketing was one of the principal aims of the Norris-LaGuardia Act. *United States v. Hutcheson*, 312 U.S. 219 (1941); *Bakery Drivers v. Wagshal*, 333 U.S. 437, 442 (1948); cf. *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503 (2d Cir. 1942) (L. Hand, J.). See also F. Frankfurter & N. Green, *The Labor Injunction* (1930) (describing how courts frustrate one after another legislative attempt to authorize secondary picketing). Section 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107, contains some exceptions from the ban on injunctions, but the parties agree that none of these exceptions applies to this case.

It therefore appears to follow that the district court was not allowed to issue an injunction. But the district court relied on a definitional provision of the Norris-LaGuardia Act. Sections 1 and 4 apply only to action "involving or growing out of a labor dispute." "Labor dispute" is defined by § 13(c), 29 U.S.C. § 113(c), to include secondary pressure. It is any "controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee." The dispute between the Union and the Railroads is a "labor dispute" under § 13(c) because it concerns the Union's terms and conditions of employment, even though not employment by the Railroads. See also *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702 (1982). Section 13(a), 29 U.S.C. § 113(a), on which the district court relied, defines "involve or grow out of". Section 13(a) states that a "case shall be held to involve or grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; . . . or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein". The district court concluded that the Union's

desire to picket the premises of the Railroads does not "grow out of" a labor dispute within the meaning of § 13(a).

The court gave two reasons. First, it held, picketing of a secondary employer's premises "grows out of" a labor dispute only when the secondary employer is so "aligned" with the primary employer that its economic activity significantly undermines the union's economic interest. Slip op. 9-18, relying on *Ashley, Drew & N. Ry. v. United Transportation Union*, 625 F.2d 1357 (8th Cir. 1980). The Burlington Northern does not connect with any of the Guilford lines, and over the course of a year it carries only 1,400 cars received from or bound to a Guilford line. This is 0.043% of the Burlington's traffic. The Union Pacific last year handled 601 carloads, or only 0.019% of its total business. So it goes with Santa Fe (248 carloads, 0.011% of traffic). The district court thought these and other plaintiffs just too far removed from the fray to be depicted as allies—witting or incidental—of the Guilford lines. The Baltimore & Ohio and the Chesapeake & Ohio connect directly with Guilford lines in Buffalo and Philadelphia, although not with lines of the Maine Central. The Union contends, without contradiction, that the Chesapeake & Ohio has altered its ordinary practices in Buffalo to allow Guilford supervisors to handle the connection, sparing its employees the decision whether to cross the Union's picket line. The district court concluded, however, that although the connections of traffic may be important to the Guilford lines, they are not important to the Baltimore & Ohio or the Chesapeake & Ohio, for neither the B&O nor the C&O derives even 1% of its revenue from traffic interchanged with the Guilford lines. This is too little, the district court thought, to be a "substantial alignment" of the secondary employer with the primary, and therefore the dispute does not "grow out of" the Maine Central's dispute with the Union.

The district court's second reason why the dispute does not "grow out of" a labor dispute is that the Union is

applying pressure designed to induce the Railroads to violate their obligation under the Interstate Commerce Act to provide "safe and adequate service" (49 U.S.C. § 11101(a)) without discrimination. If the Railroads knuckled under to the Union, the court believed, they would violate the Interstate Commerce Act. Finally, the district court thought that an injunction would vindicate the processes of the Railway Labor Act. The Railway Labor Act requires extended conciliation of all "major disputes". The court characterized the question whether the Union could picket the Railroads as a "major dispute" subject to conciliation under the Railway Labor Act, and it concluded that it therefore was empowered to enjoin the picketing pending exhaustion of this process.

III

The Railroads do not defend the district court's final reason. A "major dispute" under the Railway Labor Act is a dispute "concerning rates of pay, rules, and working conditions". 45 U.S.C. § 152 First. The Railroads do not have a dispute with the Union about any of these. There is a dispute about whether the Union may picket the Railroads' places of business, but this is neither a "major" dispute nor a "minor" one (one growing out of an application of a collective bargaining agreement). The principle that a court may issue an injunction against a strike during the completion of the statutory processes for the resolution of "major disputes", see *Chicago & N.W. Ry. v. United Transportation Union*, 402 U.S. 570 (1971) (collecting earlier cases), therefore does not apply. There are no statutory processes to complete. An injunction would not hold the dispute in stasis pending mediation; it would resolve the dispute by depriving the Union of its right to self-help after completion of the tortuous path established by the Railway Labor Act.

The district court's second reason the Railroads defend but meekly. Their effort to identify a "violation" of the

Interstate Commerce Act is unsuccessful. The Railroads would violate the Commerce Act if they refused to handle traffic from and to the Guilford lines; the statute forbids discrimination in the handling of traffic. 49 U.S.C. § 11101(a). But the Railroads have a lawful alternative: handle all traffic, unless compelled by a strike to handle none. Presumably the Railroads would urge their employees not to honor the Union's picket lines. Although the Railroads suggested at oral argument that shutting down a railroad because of a strike would violate the statutory requirement to provide safe and adequate transportation, 49 U.S.C. § 11101(a), the suggestion is ludicrous. There have been hundreds, perhaps thousands, of railroad strikes since 1887; until now no one has thought that a railroad that would like to provide service but cannot do so for reasons beyond its control is violating the statute. The Railroads offer neither legislative history nor any other support for their argument.

At all events the argument is irrelevant. The Norris-LaGuardia Act limits the authority of courts to supply a particular remedy, the injunction. No injunction should issue, with or without the Norris-LaGuardia Act, unless a strike is (or causes) a violation of some other law. One function of the Norris-LaGuardia Act, then, is to remove the injunction as a remedy for *illegal* strikes and picketing. (Another important function is to get rid of injunctions issued by judges out of hostility to organized labor or because of the mistakes that are apt to be made in the interpretations of other laws when judges must act on emergency requests in advance of full deliberation. No one contends, however, that the injunction issued here arises from anything other than a conscientious effort to apply existing legal norms.) Because a principal function of the Norris-LaGuardia Act is to limit to money damages the remedy for illegal strikes, it is unimportant that the Railroad can point to a reason why this picketing might be unlawful. The Supreme Court has held that the Norris-LaGuardia Act's ban on federal in-

junctions is not lifted because the conduct of the union is unlawful under some other, nonlabor statute. *Order of Railroad Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330, 339 (1960); *Drivers' Union v. Lake Valley Co.*, 311 U.S. 91, 103 (1940). The district court conceded that its result "may be at odds with" *Telegraphers* (slip op. 19). It is.[1]

This leaves only the first of the district court's grounds, its conclusion that the Railroads are not allied with the Guilford lines and so may not be visited with secondary picketing. Before we consider this, however, we discuss an argument the district court did not reach—that the Railway Labor Act of its own force authorizes injunctions against secondary picketing. This contention, the Railroads' principal argument on appeal, was preserved in the district court, and it is therefore before us too. *Massuchusetts Mutual Life Insurance Co. v. Ludwig*, 426 U.S. 479 (1976).

IV

The interaction between the Railway Labor Act and the Norris-LaGuardia Act is untidy. The Railway Labor

[1] The Railroads rely on *Missouri Pacific R.R. v. United Transportation Union*, 782 F.2d 107, 111-12 (8th Cir. 1986), which they say stands for the proposition that courts should "accommodate" the Norris-LaGuardia Act to other statutes. The Eighth Circuit sustained an injunction against a strike in reliance on 49 U.S.C. § 11341(a), which it construed as excluding railroad mergers approved by the ICC from the operation of all other laws, even the Norris-LaGuardia Act. The strike in question arose in the aftermath of a merger, and the court held that § 11341(a) allowed an injunction. We need not decide whether the Eighth Circuit correctly understood § 11341(a); the meaning of that statute is before the Supreme Court in *Brotherhood of Locomotive Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985), *cert. granted*, 106 S. Ct. 1457 (1986). The Eighth Circuit concluded that § 11341(a) expressly overrode the Norris-LaGuardia Act; so too does § 10(*l*) of the NLRA, 29 U.S.C. § 160(*l*), in certain suits by the Labor Board; the Railroads do not contend, however, that any statute pertinent to this case expressly lifts the application of the Norris-LaGuardia Act.

Act establishes machinery for the conciliation of "major" and "minor" disputes but is silent on what happens if the ponderous mechanism fails to resolve a "major" dispute. The Norris-LaGuardia Act, enacted six years later, eliminates injunctions as remedies for peaceful picketing growing out of labor disputes but does not say whether this includes "major" disputes under the Railway Labor Act. Right from the start Members of Congress questioned the relation between these statutes. (We discuss this below.) The Supreme Court has found the going rocky, on the one hand holding that because the Railway Labor Act contemplates that the parties will refrain from self-help during the resolution of disputes, the Norris-LaGuardia Act does not apply to injunctions that support the Railway Labor Act's dispute-resolution machinery,[2] and on the other hand holding that the Railway Labor Act of its own force prevents states' issuance of injunctions after the conciliation process has run its course. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969).

The structure of the Railway Labor Act has remained fundamentally the same despite galloping developments in other branches of labor law. The National Labor Relations Act of 1935, which applies to almost every firm affecting interstate commerce, excludes railroads and their employees. 29 U.S.C. §§ 152(2), 152(3). The NLRA initially joined the Norris-LaGuardia Act in indifference to secondary picketing, but the Taft-Hartley Amendments of 1947 added § 8(b)(4), 29 U.S.C. § 158(b)(4), which forbids most secondary picketing and secondary boycotts. The Taft-Hartley Amendments also added §§ 10(j) and 10(*l*), 29 U.S.C. §§ 160(j) and

[2] E.g., *Chicago & N.W. Ry. v. United Transportation Union*, 402 U.S. 570 (1971); *Brotherhood of Locomotive Engineers v. Louisville & Nashville R.R.*, 373 U.S. 33 (1963); *Brotherhood of Railroad Trainmen v. Chicago River & Indiana RR.*, 353 U.S. 30 (1957).

160(*l*), which permit the Labor Board to seek injunctions against forbidden practices, including secondary activity. Since 1947, then, injunctions have been available at the Board's discretion against secondary picketing in almost every business except railroading. The Railroads therefore press the claim that Congress could not have meant the railroad industry, the subject of the earliest comprehensive labor relations legislation, to be laid waste by a practice that has been banned in every other industry. Why would Congress exclude *only* railroads?

Why railroads? is not a question open to courts, however. The NLRA excluded railroads for reasons Congress found sufficient. There are anomalies no matter how we decide. One could as easily ask why Congress would have allowed *employers* to seek injunctions against secondary picketing only in the railroad business, while interposing the Labor Board between employers and the courts for the rest of American industry.[3] The Railroads' contention that injunctions are available against secondary picketing under the Railway Labor Act implies that between 1932 and 1947 railroads were the only industry protected against this practice. Just as it is hard to see why railroads alone should be excluded from this protection today, it is hard to see why they would be the only ones protected (under the Railroads' position) in 1932. The interaction of statutes often is not smooth, differences often have no articulable rationale, and statutes enacted 21 years apart (as the Railway Labor Act and

[3] The requirement of the Labor Board's involvement is unyielding. Only the Board may bring suit under the NLRA against secondary picketing. One possible end run would have been an injunction against employees' honoring the secondary picketing. *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976), held, however, that the Norris-LaGuardia Act forbids the issuance of such injunctions pending arbitration, even when the collective bargaining agreement contains both a clause forbidding sympathy strikes and an arbitration clause. (An injunction may be available to enforce the arbitrator's decision, however.)

Taft-Hartley Amendment were) often pull in dramatically different directions. Courts must abide by the legislative choice unless the Constitution compels identical treatment (which no one contends in this case). The meaning of the Railway Labor Act depends on what happened in 1926, as the meaning of the Norris-LaGuardia Act depends on what happened in 1932. We put to one side all later developments. (The Railway Labor Act has been amended many times since 1926, but none of these amendments helps to resolve today's dispute.) That secondary picketing is unlawful and enjoinable today in almost every other industry is none of our business. The Railroads are governed by the compromises Congress made in 1926 and 1932.

The Railroads' arguments under the Railway Labor Act depend on two propositions: first, that the Railway Labor Act makes secondary picketing unlawful; second, that anything unlawful under the Railway Labor Act may be enjoined notwithstanding the Norris-LaGuardia Act. Neither is correct.

The Railway Labor Act supplies mechanisms for resolving disputes but does not say what parties may do if a "major" dispute cannot be resolved.[4] The silence of the statute leaves the parties to engage in self-help. The Railroads do not dispute the Union's right to strike the Maine Central or even all the Guilford lines, but they say that the law forbids secondary picketing. Because the statutory language does not hint at such a prohibition, the Railroads turn to the law in force in 1926. No doubt this law forbade secondary picketing. E.g., *Duplex Print-*

[4] "Minor" disputes must be submitted to arbitration if either party requests it, and the results of this are binding on both sides. The Court has inferred from the binding quality of the arbitration a prohibition against strikes during or after the resolution of a minor dispute. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. at 34, 39-42; *Brotherhood of Locomotive Engineers v. Louisville & Nashville R.R.*, 373 U.S. at 38-42.

ing Co. v. Deering, 254 U.S. 443, 475-77 (1921); *Toledo, A.A. & N.M. Ry. v. Pennsylvania Co.*, 54 Fed. 730 (N.D. Ohio 1893) (Taft, J.). The Railway Labor Act was designed in part "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein", 45 U.S.C. § 151a(1). See also *Texas & New Orleans R.R. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548, 565 (1930); *Chicago & N.W. Ry.*, 402 U.S. at 574-78. So, the Railroads conclude, the Railway Labor Act must incorporate the pre-Act law of secondary pressure, for otherwise parties would be free to wage destructive battles as soon as the statutory negotiation periods ended, and the Act would fail to prevent interruptions of commerce.

This argument confuses the anticipated effects of the statute with the rules the statute establishes. Congress believed that the Railway Labor Act would prevent industrial strife. But this goal is not itself a rule of law. It is a result of faithful application of the statutory rules. The Act protects interstate commerce by the mechanisms Congress provided: negotiation, negotiation, and more negotiation, all under the threat of resort to self-help. To curtail the self-help at the end of this sequence is to change the incentives under which the negotiation occurs, to make negotiation less likely to succeed (or, if it succeeds, to do so on terms unions will find inferior). If the Union's economic weapons are limited, this translates to lower wages during negotiations or reduces the employer's willingness to agree at all and allows it to hold out and implement terms unilaterally at the end of the process. We cannot say that a prohibition against secondary picketing will lead to less strife; maybe it will lead to more, as railroads stand fast and unions resort to more primary strikes.

At all events, this is not a question on which Congress has called for the courts' decisions. Some statutes prescribe goals such as safety or competition and require

courts to devise the rules that will achieve those goals; others prescribe rules that will lead to more or less of the goal. When Congress writes the rule, courts may not transmute the statute into the other form by inventing new rules to pursue the goal Congress had in mind. *United States v. Medico Industries, Inc.*, 784 F.2d 840, 844 (7th Cir. 1986); *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986). The Railway Labor Act is a statute establishing rules, not a statute establishing goals and calling on the judiciary to create the rules. The rule in question is that the railroad and its unions must pursue the process of conciliation through all its many forms, in good faith (see *Chicago & N.W. Ry. v. United Transportation Union*), to its conclusion. When the process is over, each side may engage in lawful self-help. What kinds of self-help are lawful (for example, may either side use violence?) depends on other statutes. The purposes laid out in § 151a are useful only in understanding the meaning of the terms that appear in the statute, as the Court used them in *Chicago & N.W. Ry.* They are not warrants for inventing prohibitions the Railway Labor Act does not contain.

The Supreme Court stilled any doubt on this score in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal.* The Railway Labor Act's process ran its course, and the union began a strike. The union's tactics included secondary picketing. (The target of this picketing was affiliated with the struck employer, but the Supreme Court made nothing of this and neither do we.) The employer obtained an injunction against the secondary picketing from a state court. The Supreme Court held that the Railway Labor Act preempted any state law that foreclosed this economic weapon to the union. The employer's first argument was the same as the Railroads' argument here: that the Railway Labor Act, in order to reduce the disruption of interstate commerce, silently adopted the rule against secondary pressure that existed in 1926. The Court's answer was brusque: "To refer to

the 'general' labor law, as it existed around the time the [Railway Labor] Act came into being, would be ahistorical." 394 U.S. at 382. The Railway Labor Act and the Norris-LaGuardia Act together repudiated rather than adopted that law. *Id.* at 382-83. The Railway Labor Act "is wholly inexplicit as to the scope of allowable self-help." *Id.* at 391. The Court therefore declined to adopt either "general" principles of labor law or the corpus of rules that has developed under the National Labor Relations Act. *Ibid.* It held instead that states may not regulate secondary pressure during railroad strikes, and it invited Congress to legislate if it wanted a different balance, *id.* at 392. Congress has been silent these 17 years.

Our case follows directly from *Jacksonville Terminal.* If states, the holders of all residual powers of governance, are forbidden to curtail secondary picketing, federal courts may not do so. The Railroads insist that *Jacksonville Terminal* concerns *only* states, that it is an application of the rule that state law is preempted when conduct is "arguably protected" *or "arguably prohibited"* by federal labor law. See *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246 (1959). Preemption of the state's law in *Jacksonville Terminal* may have meant only that the Railway Labor Act "arguably" allows secondary picketing, or even that the Act "arguably prohibits" secondary picketing. If so, there is hope yet for the Railroads. But the "arguably protected-arguably prohibited" standard for preemption was drawn from the National Labor Relations Act, a statute the Court found unhelpful in *Jacksonville Terminal.* The Court did not use this standard. It instead inquired directly whether secondary picketing is a lawful method of self-help, one Congress meant to leave unregulated, and held that it is. Cf. *Golden State Transit Corp. v. City of Los Angeles*, 106 S. Ct. 1395, 1399 (1986) (treating *Jacksonville Terminal* as an example of this branch of preemption analysis in labor law). After observing that "[n]o cosmic principles

announce the existence of secondary conduct, condemn it as an evil, or delimit its boundaries", 394 U.S. at 386, and that it is difficult to decide even under the National Labor Relations Act how much secondary activity is too much, *id.* at 386-90, the Court posed the question whether the judicial branch should try to draw lines separating the permitted from the forbidden secondary activity under the Railway Labor Act; *id.* at 391. It answered No. Until Congress acts, secondary activity is to remain unregulated. The dissenting justices agreed that federal courts may not interfere with secondary conduct. 394 U.S. at 395-96 (Black, Douglas, & Stewart, JJ.). They maintained only that state courts should be allowed to regulate conduct Congress has left alone. The Court agreed unanimously in *Jacksonville Terminal*, then, that the Railway Labor Act does not forbid secondary conduct in the main, and that federal courts should not try in the name of the Railway Labor Act to separate secondary conduct into permitted and forbidden components. This conclusion dooms the Railroad's principal argument.

Even if we were to agree with this argument, however, it would not follow that a federal court may enjoin secondary conduct (as opposed to awarding damages against the Union). There is still the Norris-LaGuardia Act, which forbids the use of injunctions in primary and secondary disputes alike. Once the mediation provided by the Railway Labor Act is over, the Norris-LaGuardia Act prevents the use of injunctions against economic self-help. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. at 42 n.24, citing *Brotherhood of Railroad Trainmen v. Toledo, Peoria & W. R.R.*, 321 U.S. 50 (1944).[5] The Norris-

[5] *Toledo* actually construed § 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, which forbids the use of injunctions whenever a person has refused to exhaust other remedies, including arbitration. The Toledo R.R. refused to take a "major dispute" to arbitration. The union then resorted to violence during the strike, and violence ordinarily justifies an injunction under an exception to the Norris-

LaGuardia Act does not contain an exception for activity that is illegal under some other statute; as we have emphasized, one function of the Norris-LaGuardia Act is to disable courts from granting injunctions *despite* the illegality of the conduct. (What else would be the basis of the injunction?)

The floor debates on the Norris-LaGuardia Act contain some exchanges on which the Railroads rely. One colloquy captures the flavor of this material.

> Mr. LANKFORD of Virginia. . . . Does this make it possible for lack of an injunction to tie up railroads and prevent them from transporting milk, for instance?
>
> Mr. LAGUARDIA: I think the gentlemen was a Member of the House in 1926?
>
> Mr. LANKFORD of Virginia. No.
>
> Mr. LAGUARDIA. We then passed the railroad labor act, and that takes care of the whole labor situation pertaining to the railroads. They could not possibly come under this for the reason that we provided the machinery there for settling labor disputes.
>
> . . . .
>
> Mr. LANKFORD of Virginia. It does not apply to the transportation of milk or other necessities that go in interstate commerce?
>
> Mr. LAGUARDIA. Interstate traffic is entirely covered in the railroad labor act of 1926.

75 Cong. Rec. 5499 (1932). The Railroads conclude from this and similar exchanges that the Norris-LaGuardia Act does not apply to the railroad business. The Supreme Court held the contrary in the *Toledo* case, and we are not at liberty to disregard its decision. More,

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LaGuardia Act, 29 U.S.C. § 107(a). The Court applied § 8 to override the permission granted by § 7(a). The implication is that when a "major dispute" in the railroad industry ends at the mediation stage, the Norris-LaGuardia Act forbids injunctions without regard to the conduct of the participants during the strike.

the Railroads' excerpts do not tell the whole story. Right after Rep. LaGuardia said that the Norris-LaGuardia Act does not apply to railroads, Rep. Beck contradicted him, stating that railroad unions were the "chief proponents" of the bill because they would be its beneficiaries. *Ibid.* Rep. LaGuardia shortly contradicted himself, stating that the Railway Labor Act provides a mechanism to avert strikes but that the Norris-LaGuardia Act would apply in full force once a strike began. 75 Cong. Rec. 5504 (1932).

The Supreme Court has drawn the line in the place Rep. LaGuardia (finally) suggested it belongs. While the Railway Labor Act's processes continue, no one may use economic self-help. Those who violate this rule may be enjoined. See note 2 above. Once these processes are over, and a strike lawfully has begun, the Norris-LaGuardia Act forbids resort to injunctions. The Railroads concede that the Union has exhausted the procedures of the Railway Labor Act and that its strike against the Marine Central is lawful. The Norris-LaGuardia Act therefore applies to the Union's choice of tactics.

V

At last we arrive at the district court's principal reason for issuing an injunction, its conclusion that the Union's secondary picketing does not "grow out of" a labor dispute within the meaning of § 13(a) of the Norris-LaGuardia Act. The district court followed *Ashley, Drew & N. Ry. v. United Transportation Union*, 625 F.2d at 1363-67, which held that action "grows out of" a labor dispute only if the primary and secondary employers are "substantially aligned". See also *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R.R.*, 362 F.2d 649, 654-55 (5th Cir.), *aff'd by an equally divided Court*, 385 U.S. 20 (1966). "Substantial alignment" apparently means that one employer performs work in lieu of the other or affords financial assistance. The

Eighth Circuit held in *Ashley, Drew* that a railroad that used the switching facilities of a struck carrier was not "substantially aligned" with the struck carrier and could not be picketed. Unless the picketing would substantially "further[] the union's economic interest in a labor dispute" (625 F.2d at 1363) by removing a significant source of aid to the primary employer, the court held, it may be enjoined. The Ninth Circuit has rejected the "substantial alignment" test. *Smith's Management Corp. v. Electrical Workers*, 737 F.2d 788, 790-91 (9th Cir. 1984). See also *Central Vermont Ry. v. BMWE*, No. 86-5245 (D.C. Cir. May 14, 1986) (memorandum citing *Smith's Management* with approval but noting that a fuller opinion would follow). We agree with *Smith's Management*.[6]

Section 13(a) of the Norris-LaGuardia Act states: "A case shall be held to involve or grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; . . . or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested therein' (as defined in this section)." 29 U.S.C. § 113(a). The Union's secondary picketing "grows out of" a labor dispute under § 13(a) in several ways. The Union's members want to picket other firms "engaged in the same industry" as the Maine Central. They seek support from employees of the "same trade, craft, or occupation". The Railroads have "indirect interests" in the business of the Maine Central because they interchange traffic with the Maine Central directly (the B&O

[6] The Railroads distinguish *Smith's Management* on the ground that it does not involve the railroad industry. It should be obvious from the discussion in Part IV that this is not a pertinent difference.

and C&O) or indirectly (the other plaintiffs). The Union seeks to appeal to other people "who are members of the same or an affiliated organization of . . . of employees". And the dispute involves "conflicting or competing interests in a 'labor dispute' . . . of 'persons participating or interested therein' ", because those terms are defined broadly enough to cover the Union's disputes with both Maine Central and the Railroads. See *Jacksonville Bulk Terminals*, 457 U.S. at 709-20. In order to hold that the Union's picketing does not "grow out of" a labor dispute, we would have to overcome a lot of strong statutory language.

The Eighth Circuit felt up to this task because, it thought, a literal reading of § 13(a) would be "absurd" (625 F.2d at 1365). It wrote: "Consider, for example, a diversity case in which plaintiff seeks specific performance of a contract to sell real property. If both plaintiff and defendant belong to the same industry, trade, craft, or occupation, or have direct or indirect interests therein, a literal construction of section 13(a) would operate to deprive the federal courts of injunctive jurisdiction. The obvious lesson is that one cannot make sense of section 13(a) simply by focusing on the character of the parties; one must also consider the subject matter of the dispute." 625 F.2d at 1365 (footnote omitted). Granted one must focus on the subject matter of the dispute; the Norris-LaGuardia Act applies only to *labor* disputes, a defined term. The need for the conjunction of a "labor dispute" with something that "grows out of" that dispute does not argue for a creatively narrow construction of "grows out of", as the Eighth Circuit thought. To the contrary, the restriction of the Norris-LaGuardia Act to "labor disputes" means that courts may apply § 13(a) according to its language without engendering absurd consequences.

The Norris-LaGuardia Act was designed to overthrow the regime of *Duplex Printing*; *Bedford Cut Stone Co.*

v. Stone Cutters, 274 U.S. 37 (1927); *Lawlor v. Loewe*, 235 U.S. 522 (1914) (*Danbury Hatters*); and like cases, and to protect secondary conduct. See § 4(e), 29 U.S.C. § 104(e). It stays the hands of courts whose creativity had been employed in the service of management. The Norris-LaGuardia Act was a reaction to creatively narrow constructions of former § 20 of the Clayton Act, which had been meant to get the courts out of the business of issuing labor injunctions, but which courts had tortured until it was inapplicable to secondary conduct. See Frankfurter & Green, *The Labor Injunction. Ashley, Drew* is a step down a path that the Norris-LaGuardia Act has condemned.

No union engages in secondary conduct without expecting to advance its economic interests. Picketing takes time and money, and a call on other workers to strike is a demand for the sacrifice of fellow union members. Unions do not lightly call in their chips and impose burdens on other workers who find their own pay and working conditions satisfactory. Just as a union will not engage in secondary picketing without having something to gain, so it will never find an employer with as much at stake as the primary employer. How closely related is the secondary employer to the primary employer? This is not a matter of precise calculation, of all or nothing. There are shades, probabilities, nuances. It also depends on one's perspective. The Nation's railroads collectively exchange a small percentage of their traffic with the Guilford lines; but the Guilford lines interchange a large percentage of their traffic with the Nation's other carriers. Under the "substantial alignment" test of *Ashley, Drew* the court must assess the wisdom of the union's call on the help of employees of the secondary employer. Will a strike at the secondary employer put "a lot" of pressure on the primary employer? If so, the union may make the call; if not, not. A court applying the "substantial alignment" test is weighing

the economic gains to the union's members from secondary pressure against the losses the secondary conduct imposes on others in society. It is only a small exaggeration to say that this is exactly what courts were doing before 1932, exactly why Congress passed the Norris-LaGuardia Act. The union, its members, and the workers on whom the union calls for help—not the courts—must decide how "substantial" an "alignment" ought to be to make secondary pressure appropriate. See *United States v. Hutcheson*, 312 U.S. at 236-37.

VI

The district court issued a preliminary rather than a permanent injunction. The appellate court's task in reviewing the issuance of a preliminary injunction ordinarily is to determine whether the district court abused its discretion. *Lawson Products, Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1433-34 (7th Cir. 1986). But a court without jurisdiction has no discretion, and there is no point in assessing the balancing of the equities when no equitable considerations could support the issuance of an injunction. We have held that the Norris-LaGuardia Act deprives the district court of jurisdiction to issue an injunction against the Union's secondary picketing. There is accordingly no reason to consider any other issue and no reason to remand for further hearings.

The judgment is reversed, and the case is remanded with instructions to dismiss the complaints for want of jurisdiction.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 86 C 2442
86 C 2486
86 C 2487
86 C 2488

BURLINGTON NORTHERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY and MISSOURI PACIFIC RAILROAD COMPANY, THE ATCHISON TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, THE BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, and SEABOARD SYSTEM RAILROAD, INC.,

Plaintiffs,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

The Burlington Northern Railroad Company ("Burlington Northern") brought this action to enjoin members of the Brotherhood of Maintenance of Way Employees ("BMWE") from conducting secondary pickets and/or strikes against the Burlington Northern. On

April 9, 1986, this Court issued a temporary restraining order which preliminarily enjoined the BMWE from picketing or striking the Burlington Northern. By agreement of the parties, the preliminary injunction hearing was set over for April 21, 1986.

In the period between this Court's issuance of the temporary restraining order and the preliminary injunction hearing, a number of other railroads filed suit in the Northern District of Illinois seeking similar injunctive relief against the BMWE. On April 10, 1986, the Missouri Pacific Railroad Company/Union Pacific Railroad Company ("UP") and the Santa Fe Railway Company ("Santat Fe") filed separate suits against the BMWE. Chief Judge McGarr granted a temporary restraining order in both cases prohibiting the BMWE from picketing or striking these railroads.

The following day, April 11, 1986, Chief Judge McGarr granted another temporary restraining order in favor of The Baltimore and Ohio Railroad Company ("B&O"), The Baltimore and Ohio Chicago Terminal Railroad Company ("B&OCT"), The Chesapeake and Ohio Railway Company ("C&O"), and Seaboard System Railroad, Inc. ("Seaboard") who had, together, filed a complaint against the BMWE.

Upon the motion of the BMWE, this Court consolidated as related the three subsequently filed lawsuits: *Missouri Pacific R.R. Co. v. BMWE*, No. 86 C 2486 (N.D. Ill. April 10, 1986) (assigned to Judge Shadur); *Atchison, Topeka and Santa Fe R.R. Co. v. BMWE*, No. 86 C 2487 (N.D. Ill. April 10, 1986) (assigned to Judge Grady); and *The Baltimore and Ohio R.R. Co. v. BMWE*, No. 86 C 2488 (N.D. Ill. April 11, 1986) (assigned to Judge Norgle) with the original lawsuit filed by the Burlington Northern, *Burlington Northern R.R. Co. v. BMWE*, No. 86 C 2442 (N.D. Ill. April 9, 1986) (assigned to Judge Holderman). All parties agreed to proceed jointly at the preliminary injunction hearing on April 21, 1986.

Before the Court are plaintiffs' motion for a preliminary injunction and BMWE's motion to dissolve the temporary restraining orders entered in these related cases.

Factual Background

The following facts were adduced at the preliminary injunction hearing and from the affidavits, stipulations and other evidence submitted by the parties.

This controversy arises from a primary dispute between BMWE and the Maine Central Railroad ("MEC") and its subsidiary, the Portland Terminal Company ("PT"), concerning wages, hours and working conditions. Such a dispute is considered a "major" dispute under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.* The BMWE, having exhausted all procedures required by the RLA for resolution of a "major" dispute, instituted a lawful strike against MEC/PT that began on March 3, 1986 and continues to this day.

Apparently the strike was not as effective in bringing MEC/PT management back to the bargaining table as the BMWE had hoped. As a result, the BMWE expanded the pickets and strikes to other lines owned by MEC/PT's parent, Guilford Transportation Industries, Inc. Guilford owns the Delaware & Hudson Railroad ("D&H") and the Boston & Maine Railroad ("B&M") as well as MEC and PT.

Sometime in late March, 1986, picketing was initiated against D&H. Guilford sought to enjoin the picketing against D&H, but on April 2, 1986 in *BMWE v. Guilford Industries, Inc.*, No. 86-0084-P (D. Me. 1986), the United States District Court for the District of Maine refused to enjoin BMWE from picketing D&H.

After its initial success, the BMWE attempted to extend its picketing beyond the corporate affiliates of MEC/PT. In at least two cases the BMWE was enjoined from picketing railroads unrelated to the Guilford lines. *Con-*

rail v. BMWE, Civ. 86-0318 (W.D. N.Y. April 6, 1986) (Judge Telesca); *Richmond, Federicksburg & Potomac R.R. v. BMWE*, No. 86-3444 (4th Cir. April 12, 1986) (Judge Widener) (sitting alone by reason of the emergency nature of the proceedings).

On April 8, 1986, Mr. Ole Berge, President of BMWE, sent a telegram to the President of the Association of American Railroads, informing him of BMWE's plans to extend secondary picketing and/or strike activity against the nation's railroads. The basis for the threatened picketing and/or strike activity was the alleged participation of the nation's railroads in a "mutual aid arrangement" designed to provide money, personnel and material assistance to the MEC/PT. Undisputed testimony was presented to the Court that none of the plaintiff railroads participate in any alleged "mutual aid arrangement" with MEC/PT.

Mr. William LaRue, International Vice-President of BMWE, testified at the preliminary injunction hearing that without regard to the alleged mutual aid agreement the BMWE intended to picket and/or strike any railroad "aiding or abetting" MEC/PT and that they would picket or strike any railroad necessary to completely choke-off traffic to MEC/PT.

DISCUSSION

I. *Threshold Jurisdictional Inquiry.*

The initial question presented by these proceedings is whether the Court has jurisdiction to grant the relief requested, *i.e.*, a preliminary injunction barring BMWE from picketing and/or otherwise inducing a strike by the employees of the plaintiff railroad companies.

The Court's inquiry into its jurisdiction begins with the provisions of the Norris-LaGuardia Act of 1932, 29 U.S.C. § 101 *et seq.* (the "N-LG Act" or "N-LG"). Sec-

tion 1 of the N-LG Act generally removes the equitable power of the federal courts to issue an injunction "in any case involving or growing out of a labor dispute . . . ." 29 U.S.C. § 101. When a case "involves or grows out of a labor dispute," N-LG bars a federal court from issuing an injunction against secondary activity by a labor union, *see* 29 U.S.C. §§ 104(a), (e) and (i) and 29 U.S.C. § 113(b), except under the special circumstances enumerated in Section 7.

None of the plaintiff railroad companies have argued that the requirements of subsections (a) through (e) of § 7 have been satisfied such that this Court would be empowered under the statute's terms to issue a preliminary injunction. Rather, the plaintiff railroad companies have argued that this case does not "involve or grow out of a labor dispute," as that term has been interpreted by the courts, making the anti-injunction mandate of N-LG inapplicable to this case.

As all of the parties in this case recognize, the railroad companies' toughest obstacle in presenting this argument is the statutory definition of "involving or growing out of a labor dispute." Section 13(a) of the N-LG Act provides:

> A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; . . . or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein . . . .

The term "labor dispute" is stautorily defined to include

> any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

29 U.S.C. § 113(c).

The Supreme Court has recently recognized that the statutory definition of "labor dispute" contained in the N-LG Act is "extremely broad" and cautioned that the term must not be narrowly construed. *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 711-12, 102 S. Ct. 2672, 2680 (1982). There is no question that the dispute between BMWE and MEC and PT constitutes a labor dispute. There is a substantial question, however, whether this case between BMWE and the neutral plaintiff railroad companies "involves or grows out of" that labor dispute.

At first blush the language of the statute might induce a reader to conclude that this case involves "persons who are engaged in the same industry, trade, craft, or occupation" as the parties to the BMWE-MEC/PT dispute. The legislative history of the N-LG Act and its subsequent application in the railroad labor dispute context would seriously challenge, however, the accuracy of that conclusion.

During the floor debates on the N-LG Act, Congressman Lankford inquired into the applicability of the anti-injunction provision in the railroad labor dispute context. He asked, "Does this make it possible for lack of an injunction to tie up railroads and prevent them from transporting milk, for instance?" Congressman LaGuardia replied, "[T]he railroad labor act . . . takes care of the whole labor situation pertaining to the railroads. They could not possibly come under this for the reason that we provided the machinery there for settling labor disputes." Congressman Lankford, to clarify the point, inquired again: "It does not apply to the transportation of . . . necessities that go in interstate com-

merce?" Congressman LaGuardia reiterated his response: "Interstate traffic is entirely covered in the railroad labor act of 1926." *See* 75 Cong. Rec. 5499, 5503-5504 (1932).[1]

The Supreme Court, too, has long recognized that the provisions of the N-LG Act do not apply with full force and effect in the railroad labor dispute context. In *Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Company*, 353 U.S. 30, 77 S. Ct. 635 (1957), the Supreme Court held that

> [T]he Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved.

353 U.S. at 40, 77 S. Ct. at 640.[2] *See also Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 392-93, 89 S. Ct. 1109, 1122-1123 (1969)

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[1] As is often the case with legislative history, the congressional record reveals a far from uniform interpretation of the scope of the N-LG Act's anti-injunction provisions. Congressman Beck took issue with LaGuardia's assertion that N-LG did not pertain to disputes in the railway labor context, noting:

> There is nothing in this proposed statute that in any way excludes disputes upon the theory that the Railway Labor Board can attend to them. . . . [A] labor combination can stop every railroad in the country unless restrained by the power of an injunction. . . . The chief proponents of this bill are the railroad brotherhoods, because they know that if this bill passes, they may potentially intimidate the transportation companies . . . .

75 Cong. Rec. 5499 (1932).

[2] The Supreme Court explained that Congress's intent in enacting the Railway Labor Act was to (1) promote stable relationships between labor and management in "this most important national industry"; (2) set up a "voluntary machinery" for dispute resolution between railway management and labor, and (3) dispel the serious threat to efficient rail transportation presented by railroad management-labor disputes. 353 U.S. at 40, 77 S.Ct. at 640.

(bemoaning the lack of Congressional action in reconciling provisions of the N-LG Act, National Labor Relations Act and the Railway Labor Act and holding that primary and secondary picketing in the railway labor dispute context, when it does not conflict with any other obligation imposed by federal law, cannot be enjoined by state courts.)

Lower courts attempting to harmonize or accommodate the broad sweep of the N-LG Act's "involving or growing out of" language with the federal interest at stake in railroad labor disputes have adopted two approaches to the issue of when and whether the anti-injunction provisions of the N-LG Act apply. The Court will examine each of these tests in turn.

A. *"Substantial Alignment" Test.*

The first test has been framed as follows:

> [W]hen a non-struck employer seeks to have a union's activities enjoined by a federal court the case involves or grows out of a labor dispute—and thus the Norris-LaGuardia anti-injunction provisions apply—only when the offending activity is furthering the union's economic interest in a labor dispute.

Ashley Drew & Northern Railway Company v. United Transportation Union et al., 625 F.2d 1357, 1363 (8th Cir. 1980), citing *inter alia Brotherhood of Railroad Trainmen v. Atlantic Coast Line Railroad*, 362 F.2d 649, 654-55 (5th Cir.), *aff'd by an equally divided court*, 385 U.S. 20, 87 S. Ct. 226 (1966). This economic self-interest test asks whether the neutral railroad is "substantially aligned" in some material way with the railroad with which the union has its primary dispute, *e.g.*, whether the neutral railroad has an ownership interest in the primary railroad, provides essential services or facilities to the primary railroad, or has any "significant commonality of interest." *Ashley, Drew, supra*, 625 F.2d at 1365.[3] *See*

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[3] The United States Court of Appeals for the Eighth Circuit explained why it chose not to adhere to a literal reading of 29

also Western Maryland R.R. Co. v. System Board of Adjustment, 465 F.Supp. 963, 973 (D. Md. 1979) (for secondary picketing to be immune from injunction through N-LG Act, it must appear that secondary activity in some way promotes "fairly direct economic interests" of the union).

The record in this case is bereft of any evidence showing any "commonality of interest," let alone a significant one, between MEC or PT on the one hand and the plaintiff railroad companies on the other.

The evidence shows that MEC/PT operations are limited to Northeastern New England, specifically, Maine, New Hampshire and Vermont. The other Guilford-owned lines also operate exclusively in the Northeastern portion of the United States. The Boston & Maine ("B&M") operates in Connecticut, Massachusetts, New Hampshire, New York and Vermont. The Delaware & Hudson extends from Montreal, Canada to end points in Buffalo, New York; Newark, New Jersey; Philadelphia, Pennsylvania; and Washington, D.C. The Court will consider each of the plaintiff railroad's relationship with MEC/PT separately.

The Burlington Northern rail system extends from Chicago, its eastern terminus, through twenty-five states via three corridors, one heading northwest, another west and another southwest. The Burlington Northern System,

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U.S.C. § 113(a): "Although the plain language of a statute is often controlling, it is impermissible to follow a literal reading that engenders absurd consequences where there is an alternative interpretation that reasonably effects the statute's purpose." 625 F.2d at 1365. After surveying the legislative history of the N-LG Act, the Eighth Circuit determined that "it is reasonable to conclude that section 13(a) [29 U.S.C. § 113(a)] was meant to preclude injunctive interference with bargaining or organizing on an industry-wide or craft-wide basis. It was not meant to extend an anti-injunctive shield for union activities beyond the place where the union's interests in a labor dispute cease" *Id.* at 1366.

which ends in Chicago, is several hundred miles from the nearest MEC/PT operation. In fact, Burlington Northern does not share any direct physical rail connections with any of the Guilford-affiliated railroads. The BMWE has stipulated that:

> Burlington Northern has not performed any service for Maine Central or Portland Terminal or the other Guilford-affiliated lines after the strike commenced on the Maine Central/Portland Terminal (MEC/PT), which is in any way different to the service, if any, performed prior to the BMWE strike on the Maine Central.
>
> Burlington Northern does not provide any essential service or day-to-day service for Maine Central or Portland Terminal or any of the other Guilford-affiliated lines.

The only connection between MEC/PT and Burlington Northern is their participation in some rate tariffs involving movements originating or terminating on Guilford lines, including MEC/PT, and in which Burlington Northern is the corresponding terminating or originating carrier.[4] This indirect interchange of traffic amounted to 1,400 carloads out of 3,252,800 carloads (0.043%) handled on the Burlington Northern system in 1985. In simpler terms, the interchange of traffic between the Burlington Northern and the entire Guilford system represents 3 cars out of the 9,000 handled per day by the Burlington Northern, a *de minimus* amount. *See generally Terminal Railroad Association v. Brotherhood of Railway*, 458 F. Supp. 100, 104-05 (E.D. Mo. 1978) (holding that a *direct* interchange relationship of less than 1% is insubstantial).

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[4] "A person does not become an ally of a struck employer by continuing a pre-strike business relationship." *Drivers, Warehouse and Dairy Employees Local 75*, 175 N.L.R.B. 530, 532 (1969); *Ashley, Drew and Northern Railway Company v. United Transportation Union*, 625 F.2d 1357, 1365 n.9 (8th Cir. 1980).

Similarly, the Missouri Pacific/Union Pacific Railroad ("UP") is without any direct physical rail connections with the Guilford system, including MEC/PT, the primary disputants.

The UP's easternmost terminus is Chicago, Illinois which, again, is hundreds of miles from any point on the MEC/PT system. From Chicago the UP tracks head south to St. Louis where they split into two corridors, one heading west and the other south.

The BMWE has stipulated that:

> UP has not performed any services for Maine Central Railroad ("MEC"), Portland Terminal Company ("PT"), or any other Guilford-affiliated lines after the current strike which is in any way different to the services, if any, performed prior to said strike against these railroads.
>
> UP does not, and has not in the past, provided any essential service for MEC or PTC or any other Guilford-affiliated lines.

The UP and MEC/PT participate in rate tariffs involving car movements originating or terminating on MEC/PT lines and in which UP is the corresponding terminating or originating carrier. This indirect interchange of traffic amounted to 601 carloads out of 3,152,149 carloads (0.019%) handled on the UP system in 1985. In terms of revenue, the indirect interchange of traffic amounted to $926,000 or 0.024% of UP's total revenues in 1985. UP also received $52,000 in car-hire payments from MEC/PT which represents 0.023% of UP's total car-hire revenues received from other railroads in 1985. UP has no other relationship with MEC/PT.[5]

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[5] There was also an allegation by the BMWE that a UP supervisor named Stillingsworth has been operating trains on Guilford system tracks since April 3, 1986, but no evidentiary support for this allegation was proffered by the BMWE. UP denied that they have any employee named Stillingsworth.

The Santa Fe rail system has its easternmost terminus in Peru, Indiana. Santa Fe's major eastern terminus is Chicago, Illinois. Therefore, the Santa Fe does not have any direct physical rail connections with MEC/PT or any of the other Guilford-affiliated lines. No evidence was submitted by the BMWE to refute Santa Fe's contention that its relationship with MEC/PT is unchanged since before the inception of MEC/PT's labor dispute and that the relationship between Santa Fe and MEC/PT consists of the indirect interchange of freight cars which amounted to 248 carloads out of 2.3 million (0.011%) handled by the Santa Fe in 1985. Moreover, BMWE presented no evidence whatsoever to support its initial allegation that Santa Fe provided a list of furloughed employees and locomotive units to MEC/PT.

Finally, as to the Baltimore & Ohio ("B&O"), the Baltimore & Ohio Chicago Terminal ("B&OCT"), the Chesapeake & Ohio ("C&O") and the Seaboard, there has been no evidence showing that they have direct connections with the primary disputants, MEC/PT. B&O and C&O tracks, although extending to the eastern United States, do not come within several hundred miles of either MEC or PT facilities.

B&OCT, as its name implies, operates solely as a switching carrier in the Chicago terminal area. It has no track outside the Chicago switching district and, accordingly, is nearly 1,000 miles from the nearest MEC connection.

Seaboard operates over no track north of Richmond, Virginia, and, like B&O, C&O, and B&OCT, is located several hundred miles away from MEC/PT.

Moreover, B&OCT and Seaboard do not have any connections with any other Guilford-affiliated lines.

Neither B&O nor C&O has any connection with Guilford's B&M line, but the B&O and C&O exchange traffic with Guilford's D&H line at three locations: Buffalo,

New York; Philadelphia, Pennsylvania; and Potomac Yard (Alexandria, Virginia). Direct interconnections exist only at Buffalo (B&O and C&O) and Philadelphia (B&O only).[6] The direct interchange of traffic at these points between B&O/C&O and D&H has historically represented less than 1% of total C&O operations.

Evidence was presented that the minimal relationship between B&O/C&O and D&H has, in fact, been curtailed as the strike of MEC/PT progressed. Moreover, D&H is not a primary disputant in this case. It is being picketed because of its corporate affiliations with the primary disputants—MEC/PT. BMWE has presented no legal authority for the proposition that "substantial alignment" can be established through a railroad's relationship with a corporate affiliate of a primary disputant. Therefore, the minimal relationship between B&O/C&O and D&H is irrelevant to the determination of substantial alignment with MEC/PT. The "substantial alignment" must be tested as to the primary disputants, not some sister railroad, once removed from the primary labor dispute.

In sum, the evidence presented to the Court during the hearing on plaintiffs' motion for a preliminary injunction fails to establish that any of the plaintiff railroads are "substantially aligned" with MEC/PT. Under the "substantial alignment" test, therefore, the N-LG Act does not bar this Court from issuing an injunction because the controversy between the neutral plaintiff railroad companies and BMWE does not "involve or grow out of" a labor dispute between BMWE and MEC/PT.

BMWE has argued, however, that the "substantial alignment" test was rejected by the Supreme Court in

[6] C&O serves the Potomac Yard in suburban Washington, D.C., but does not directly connect with D&H, which also serves that yard. All C&O traffic is distributed to the other carriers serving the yard by the RF&P.

Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n, 457 U.S. 702, 102 S. Ct. 2672 (1982) and, more recently, by the United States Court of Appeals for the Ninth Circuit in *Smith's Management Corp. v. Int'l Brotherhood of Electrical Workers*, 737 F.2d 788 (9th Cir. 1984). The Court does not read these cases so broadly.

In *Jacksonville Bulk Terminals, supra*, the Supreme Court addressed the issue of whether the N-LG Act's anti-injunction provisions applied to foreclose an employer from securing an injunction against its own employees who were engaged in a politically-motivated strike. The Court rejected the employer's argument that the anti-injunction provisions applied only to union activity taken in the union's own economic, as differentiated from political, self-interest. The Court did not address however, even tangentially, (1) the proper construction of the "involving or arising out of" language of 29 U.S.C. § 113(a); (2) the applicability of the N-LG Act's anti-injunction prohibitions to neutral employers having no common interest with the primary employer; or (3) the application of the N-LG Act in the railroad labor dispute context. In sum, *Jacksonville Bulk Terminals* neither addressed nor rejected the "substantial alignment" test.

The opinion by the United States Court of Appeals for the Ninth Circuit in *Smith's Management, supra*, poses more serious obstacles for the plaintiff railroad companies. The *Smith's Management* court rejected *Ashley-Drew's* "substantial alignment/economic self-interest" test as it has been applied by the United States Courts of Appeal for the Fifth and Eighth Circuits. According to the Ninth Circuit, such a test "puts the courts in the untenable position of second-guessing a union as to the effectiveness of a particular boycott in achieving a union's goals." 737 F.2d at 791.

In *Smith's Management*, however, the Ninth Circuit was not faced, as this Court is, with the threat of a virtual halt in the nation's rail service if the "involving or growing out of" definition of section 13(a) of the N-LG Act is given its face-value meaning. Furthermore, the Ninth Circuit in *Smith's Management* was not required to accommodate national labor policy with national rail policy, and did not have to contend with congressional history indicating that the anti-injunction provisions of the N-LG Act were never intended to strip the federal courts of their power to issue injunctions against union activity threatening to disrupt vital rail services. In short, this Court believes that the Ninth Circuit's opinion simply offers no guidance in this Court's task of delineating the limits of the N-LG Act in the railroad labor dispute context. *See also Richmond, Fredericksburg and Potomac Railroad Company v. BMWE*, No. 86-3544 (4th Cir., April 12, 1986), slip op. at 5 (recognizing that the issuance of the injunction pending appeal "may well be contrary" to *Smith Management Corp.*).

This Court believes that the "substantial alignment" test represents a fair attempt by the courts to reconcile the N-LG Act's anti-injunction provisions with the national interest in steady and efficient transportation of goods by rail. Since BMWE has been unable to show any common interest between the plaintiff railroad companies and either MEC or PT, the Court does not lack jurisdiction to issue an injunction.

B. *"Other Federal Interest" at Stake Test.*

An alternative but somewhat related analysis sometimes applied by courts determining the scope of N-LG's anti-injunction provisions is whether and to what extent the secondary activity of the union conflicts with any obligation imposed on the railroads by federal law. Justice Harlan's opinion in *Jacksonville Terminal Co., supra*, apparently forms the basis of this test. In determining

that the state courts could not enjoin secondary picketing potentially allowed by the Railway Labor Act, Justice Harlan wrote that the "least unsatisfactory" solution to the problem was

> to allow parties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute to employ the full range of whatever peaceful economic power they can muster, *so long as its use conflicts with no other obligation imposed by federal law.*

Jacksonville Terminal Co., 394 U.S. at 392-93, 89 S.Ct. at 1123 (emphasis added).

The Court of Appeals for the Fourth Circuit, apparently relying on Justice Harlan's opinion, found that the economic power sought to be exerted by BMWE in a case nearly identical to this one sufficiently conflicted with the requirements imposed by federal law on interstate rail carriers that the anti-injunction provisions of the N-LG Act did not apply. *Richmond, Fredericksburg and Potomac Railroad Company, supra*, slip op. at 4. *See also Norfolk and Western Railway Company v. BMWE*, No. 86-0191-R (W.D. Va., April 11, 1986), slip op. at 1-2. *Cf.* 49 U.S.C. § 11101(a) ("a motor common carrier shall provide safe and adequate service, equipment, and facilities.")

The Court recognizes that this test may be at odds with the Supreme Court's opinion in *Order of Railroad Telegraphers v. Chicago and North Western R. Co.*, 362 U.S. 330, 80 S. Ct. 761 (1960). In *Railroad Telegraphers* the Court declined to hold that the anti-injunction provisions of the N-LG Act are lifted when union activity is unlawful under "some other, nonlabor statute." 362 U.S. at 338-39, 80 S. Ct. at 765-66 & n.15. To the extent the test has validity, however, it weighs in favor of a determination that this Court has jurisdiction to issue an injunction in this case since the Union's activity

would clearly interfere with the plaintiff railroad companies' ability to comply with the Interstate Commerce Act. *Cf. Toledo, P.&W. Railroad v. Brotherhood of Railroad Trainmen*, 132 F.2d 265, 269-70 (7th Cir. 1942), *rev'd on other grounds*, 321 U.S. 50, 64 S. Ct. 413 (1944) (inferring from duty of railroad company to provide safe and adequate service corresponding federal right to relief from unprivileged interference with that duty).

C. *Failure to Exhaust Procedural Prerequisites of RLA.*

An alternative rationale compels this Court's conclusion that it has jurisdiction to issue an injunction in this case. As early as 1937, the Supreme Court recognized that federal courts may grant injunctive relief, despite the N-LG Act, to "vindicate the processes of the Railway Labor Act." *Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Company*, 353 U.S. 30, 41, 77 S. Ct. 635, 641 (1957), *citing Virginia R. Co. v. System Federation No. 40*, 300 U.S. 515, 57 S. Ct. 592 (1937). BMWE's failure to exhaust the processes implemented for dispute resolution in the RLA lifts any ban the N-LG Act may have placed on the exercise of this Court's equitable jurisdiction.

The RLA itself sets forth the goals sought to be achieved by Congress through its enactment. *See* 45 U.S.C. §§ 151a, 152. The first goal stated in the statute is the avoidance of any interruption to commerce or to the operation of any carrier engaged in commerce. 45 U.S.C. § 151a(1).

Section 2 of the RLA imposes a duty on all rail carriers and their employees "to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U.S.C. § 152 First. The Supreme Court has noted that § 2 First

"was intended to be more than a mere statement of policy or exhortation to the parties; rather, it was designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis." *Chicago and North Western Railway Company v. United Transportation Union*, 402 U.S. 570, 577, 91 S. Ct. 1731, 1735 (1971).

This interruption to commerce threatened in this case arises out of the dispute between MEC/PT and its employees. The record in this case reveals that BMWE failed entirely to attempt settlement of the dispute between it and the neutral plaintiff railroads, thereby abrogating its § 2 First duty. Because the BMWE has violated the settlement command of the RLA, the anti-injunction provisions of N-LG do not bar issuance of an injunction.

The Court believes, moreover, that BMWE impermissibily seeks to avoid compliance with the processes designed by Congress in the RLA for dispute resolution.

Section 5, First of the RLA confers jurisdiction to a National Mediation Board over the following types of disputes:

> The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:
>
> (a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.
>
> (b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Court believes that this case involves a dispute between a "group of employees and a carrier."[7] The record in this case reveals that sixty-six rail carriers, including most of the neutral plaintiff railroad carriers here, have invoked the services of the Mediation Board pursuant to the "catch-all" provision of 45 U.S.C. § 155 First(b). That section clearly contemplates that during the pendancy of the Board's mediation efforts the parties to this controversy are not free to engage in self-help economic coercion. *Cf. Summit Airlines v. Teamsters Local Union No. 295*, 628 F.2d 787, 794-95 (2d Cir. 1980). BMWE may be enjoined from doing so. *Id.* at 795.

Alternatively, the Court believes that the dispute between BMWE and the neutral plaintiff railroads in this case constitutes a "major dispute" under the RLA, and that BMWE has failed to comply with the RLA's processes for resolving such a dispute. The RLA provides that parties disagreeing over the formation of and changes in the terms and conditions of a collective bargaining agreement (*i.e.* "major disputes") must comply with the "purposely long and drawn out" procedures of the RLA, including mandatory negotiation and optional arbitration, in the hope that "reason and practical con-

[7] The Court recognizes that § 155 First(b) has been interpreted as conferring jurisdiction to the Mediation Board only to the extent that the "any other disputes" referred to in that section involve an employer and its own employees. *See* Note, *Judicial Approaches to Secondary Boycotts Under the Railway Labor Act*, 42 N.Y.U.L.Rev. 928, 933 (1967) ("the language of the statute restricts the Board's jurisdiction to disputes between a carrier and *its* employees") (emphasis in original) (cited in *Ashley, Drew, supra*, 625 F.2d at 1369). *But see Conrail v. BMWE, et al.*, No. 86-0318 (W.D.N.Y. April 6, 1986), slip op. at 62. The Court has been unable to find any judicial opinion, however, holding that the Mediation Board's jurisdiction is so limited and the language of the statute, conferring jurisdiction over disputes between employees and "*a* carrier," appears to the Court to belie the existence of such a privity requirement.

siderations will provide in time an agreement that resolves the dispute." *Brotherhood of Railway and Steamship Clerks, et al. v. Florida East Coast Railway Company*, 384 U.S. 238, 246, 86 S. Ct. 1420, 1424 (1966). The dispute between BMWE and MEC/PT clearly constitutes such a "major dispute."

In *BMWE v. Association of American Railroads*, No. 86-951 (D.D.C. April 10, 1986), Judge Green of the United States District Court for the District of Columbia determined that, since the dispute between BMWE and MEC/PT is a "major dispute," then the dispute between BMWE and neutral railroad carriers would also qualify as "major" under the RLA. *See BMWE v. Association of American Railroads*, No. 86-951 (D.D.C. April 10, 1986), transcript of proceedings at 2. Judge Green in dicta determined that "it may be a violation of the Railway Labor Act to fail to utilize the machinery of that act, particularly that of the mediation board, to resolve the dispute."[8]

This Court agrees that the dispute between the neutral plaintiff railroads and BMWE constitutes a major dispute under the RLA. Until the processes enacted by Congress for the settlement of such disputes are taken, therefore, this Court has equitable jurisdiction to enjoin BMWE from engaging in economic self-help. *See generally Detroit and Toledo Shore Line Railroad Company v. United Transportation Union*, 396 U.S. 142, 149, 90 S. Ct. 294, 298-99 (1969) (RLA prohibits altering the "status quo" by resorting to self-help while the RLA's processes are being exhausted).

[8] Judge Green determined that a temporary restraining order was not justified in that case since the railroads had failed to establish a serious threat of irreparable harm or that the public interest would best be served through the equitable relief sought. *See* transcript of proceedings at 3.

II. *Preliminary Injunction Standards.*

To issue a preliminary injunction the Court must find: (1) that the moving parties have no adequate remedy at law; (2) they will suffer irreparable harm if the preliminary injunction is not issued; (3) that the irreparable harm the moving parties will suffer if the preliminary injunction is not granted is greater than the irreparable harm the defendant will suffer if the preliminary injunction is granted; (4) that the moving parties have a reasonable likelihood of prevailing on the merits; and (5) that the injunction will serve the public interest. *See Brunswick Corp. v. Jones,* No. 85-1402, slip op. at 4. (7th Cir. Feb. 24, 1986); *Lawson Products, Inc. v. Avnet,* 782 F.2d 1429 (7th Cir. 1986).

Plaintiffs have met their burden in showing that each of these five considerations weigh in favor of the issuance of a preliminary injunction.

It is beyond dispute that the plaintiff railroad companies are without a remedy at law to prevent the unlawful picketing and must, therefore, seek to invoke the Court's equitable powers. It is equally clear that each of the plaintiff railroads would suffer irreparable harm if the Court did not grant a preliminary injunction. Moreover, in weighing the interests of the plaintiff railroads and the defendant union, the Court finds that the threatened injury to the plaintiffs outweighs the harm the injunction may inflict upon the BMWE.

The Court, as reflected in this opinion, believes that the railroads have a reasonable likelihood of success on the merits of this case.

Based upon the threatened disruption of the nation's rail service, the Court finds that the public interest weighs heavily in favor of the issuance of the preliminary injunction, which will ensure the continued interstate transportation of vital goods.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for a preliminary injunction against picketing and/or striking by the BMWE is GRANTED. Defendant BMWE's motion to dissolve the temporary restraining orders is DENIED.

ENTER:

/s/ James F. Holderman
JAMES F. HOLDERMAN
United States District Judge

DATED: April 23, 1986

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Before

HON. JOEL M. FLAUM, *Circuit Judge*

HON. FRANK H. EASTERBROOK, *Circuit Judge*

HON. LUTHER M. SWYGERT, *Senior Circuit Judge*

No. 86-1666

BURLINGTON NORTHERN RAILROAD COMPANY, *et al.*,
Plaintiffs-Appellees,
v.

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES, *et al.*,
Defendants-Appellants.

July 8, 1986

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
Nos. 86 C 2442 et al.
JAMES F. HOLDERMAN, *Judge*

ORDER

Plaintiffs-appellees filed a petition for rehearing and suggestion of rehearing en banc and, in the alternative,

a motion for stay of mandate pending application for a writ of certiorari on June 11, 1986. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing and the motion for stay of mandate. The petition for rehearing and motion for stay of mandate are DENIED. The mandate shall issue forthwith.

APPENDIX D

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Before

HON. JOEL M. FLAUM, *Circuit Judge*

HON. FRANK H. EASTERBROOK, *Circuit Judge*

HON. LUTHER M. SWYGERT, *Senior Circuit Judge*

No. 86-1666

BURLINGTON NORTHERN RAILROAD COMPANY, *et al.*,
Plaintiffs-Appellees,

v.

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES, *et al.*,
Defendants-Appellants.

June 4, 1986

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

Nos. 86 C 2442, 86 C 2486,
86 C 2487, 86 C 2488
JAMES F. HOLDERMAN, *Judge*

This case was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and the cause is REMANDED with instructions to dismiss the complaints for want of jurisdiction, in accordance with the opinion of this Court filed this date.

APPENDIX E

RAILWAY LABOR ACT, 45 U.S.C. § 151 ET SEQ.

§ 151a. *General purposes*

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

§ 152. *General duties—Duty of carriers and employees to settle disputes*

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Consideration of disputes by representatives

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and,

if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * * *

Conference of representatives; time; place; private agreements

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice; *And provided further,* That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

* * * *

§ 153. *National Railroad Adjustment Board—Establishment; composition; powers and duties; divisions; hearings and awards; judicial review*

First.

* * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * *

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

§ 155. *Functions of Mediation Board—Disputes within jurisdiction of Mediation Board*

First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communications with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

* * * *

§ 156. *Procedure in changing rates of pay, rules, and working conditions*

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

§ 157. *Arbitration—Submission of controversy to arbitration*

First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in sections 151-156 of this title, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed

as a violation of any legal obligation imposed upon such a party by the terms of this chapter or otherwise.

* * * *

§ 160. *Emergency Board*

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

NORRIS-LAGUARDIA ACT, 29 U.S.C. § 101 ET SEQ.

§ 101. *Issuance of restraining orders and injunctions; limitation; public policy*

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

§ 104. *Enumeration of specific acts not subject to restraining orders or injunctions*

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is

being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

§ 113. *Definitions of terms and words used in chapter*

When used in this chapter, and for the purposes of this chapter—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees

or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

NATIONAL LABOR RELATIONS ACT, 45 U.S.C. § 151 ET SEQ.

§ 158. *Unfair Labor Practices*

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e) [subsec. (e) of this section];

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: Provided, further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

INTERSTATE COMMERCE ACT, 49 U.S.C. § 10101 ET SEQ.

§ 11101. *Providing Transportation and Service*

(a) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide the transportation or service on reasonable request. In addition, a motor common carrier shall provide safe and adequate service, equipment, and facilities. A rail carrier shall not be found to have violated this section because it fulfills its commitments under contracts approved under section 10713 of this title before responding to reasonable requests for service.

APPENDIX F

STATEMENT REQUIRED BY RULE 28.1:

Listed below are all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of the petitioners:

Atchison Topeka & Sante Fe Railway

Santa Fe Southern Pacific Corporation
Advertising Direction, Inc.
Alameda Belt Line
B & C General Agency, Inc.
The Belt Ry. Co. of Chicago
Central California Traction Co.
Cerrillos Land Co.
Chula Vista Bayfront Investment Co.
The Clinton and Oklahoma Western R.R. Co.
The Denver Union Terminal Ry. Co.
The Dodge City and Cimarron Valley Ry. Co.
Fresno Interurban Ry. Co.
Gallo Wash Coal Co.
The Garden City, Gulf and Northern R.R. Co.
The Gulf and Inter-State Ry. Co. of Texas
Gulf Central Pipeline Co.
Gulf Central Storage and Terminal Co.
Gulf Central Storage and Terminal Co. of Nebraska
Haystack Mountain Development Co.
Hospah Coal, Co.
Houston Belt & Terminal Ry. Co.
Joliet Union Depot Co.
Kansas City Terminal Ry. Co.
The Kansas Southwestern Ry. Co.
Keokuk Union Depot Co.
Kirby Forest Industries, Inc.
Limited Partnership Management, Inc.
Los Alamos Constructors, Inc.
Los Angeles Junction Ry. Co.

McKee Building Services, Inc.
Robert E. McKee, Inc.
The Oakland Terminal Ry.
Oklahoma City Junction Ry. Co.
Pintada Coal Co.
Rio Grande, El Paso and Santa Fe R.R. Co.
SF Coal Corp.
SF Energy Co. of Columbia
SF Energy Co. of Indonesia
SF Energy Co. of Indonesia (Bunyu Block)
SF Energy Co. of Indonesia (Java Basin (A))
SF Energy Co. of Indonesia (Java Basin (B))
SFM Nebraska, Inc.
SF Minerals Corp.
SGSI Corp.
St. Joseph Terminal R.R. Co.
San Diego Pipeline Co.
Santa Fe Capital Inc.
Santa Fe Energy Co.
Santa Fe Energy Co. of Tunisia
Santa Fe Energy Products Co.
Santa Fe Forwarding Co.
Santa Fe Industrial Realty Co.
Santa Fe Industries, Inc.
Santa Fe Land Improvement Co.
Santa Fe Marketing Co.
Santa Fe Mining, Inc.
Santa Fe Natural Resources, Inc.
Santa Fe Oil Co.
Santa Fe Pacific Fuels Co.
Santa Fe Pacific R.R. Co.
Santa Fe Pipeline Co.
Santa Fe Pipelines, Inc. (Delaware)
Santa Fe Rail Equipment Co.
Santa Fe Southern Pacific Corporation
Santa Fe Southern Pacific Foundation
Santa Fe Terminal Services, Inc.
Santa Fe Towers Land Co.

Santa Fe Transportation Co. (California)
Southern Pacific & Santa Fe Railway Co.
Southwest Pipe Line Co.
Standard Office Building Corp.
Star Lake Railroad Co.
Sun Country Construction Co.
Sunset Railway Co.
Texas City Terminal Ry. Co.
Trailer Train Co.
Transit Ice Co.
Walker-Kurth Lumber Co.
The Wichita Union Terminal Ry. Co.
The Zia Co.

The Baltimore and Ohio Railroad Company

The Baltimore and Ohio Chicago Terminal Railroad Company

The Chesapeake and Ohio Railway Company

CSX Transportation, Inc.

CSX Corporation
Allegheny and Western Railway Company
The Baltimore and Cumberland Valley Rail Road Extension Co.
The Baltimore and Philadelphia Railroad Company
The Cincinnati Inter-Terminal Railroad Company
Clearfield and Mahoning Railway Company
The Cleveland Terminal and Valley Railroad Company
Dayton and Michigan Railroad Company
Dayton and Union Railroad Company
The Home Avenue Railroad Company
Mid-Allegheny Corporation
New Gauley Coal Corporation
Richmond, Fredericksburg & Potomac Railroad Company
Richmond-Washington Company
The Wincester and Potomac Railroad Company

Burlington Northern Railroad Company

Burlington Northern, Inc.
The Belt Railway Company of Chicago
Burlington Northern Dock Corporation
Burlington Northren (Manitoba) Limited
Burlington Northern (Oregon-Washington), Inc.
Burlington Northern Railroad Properties, Inc.
Camas Prairie Railroad Company
Clarklon, Inc.
Clarklon Royalty, Inc.
The Colorado & Southern Railway Company
Davenport, Rock Island & North Western Railway Company
The Denver Union Terminal Railway Company
The Fort Worth and Denver Railway Company
Galveston Terminal Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
Saint Louis-San Francisco Railway Company
The Lake Superior Terminal & Transfer Railway Company
The Longview Switching Company
The Minnesota Transfer Railway Company
The Paducah & Illinois Railroad Company
The Portland Terminal Railroad Company
The St. Paul Union Depot Company
Southland Realty
The Terminal Railroad Association of St. Louis Company
Trailer Train Company
Western Fruit Express Company
The Wichita Union Terminal Railway Company
Winnona Bridge Railway Company
Northern Radial Limited

Burlington Northern is affiliated with the El Paso Company whose affiliates include:

El Paso Natural Gas Company
Bemm Holding Corporation
El Paso de Peru Company
El Paso Development Company

Ex-Mission Ranches, Inc.
Lake Country
Wind Jammer, Inc.

Adams Canyon Ranch
Santa Paula Farms

El Paso Gas Marketing Company
El Paso Hydrocarbons Company
El Paso Frontera Corporation
El Paso Gas Transportation Company
El Paso Hydrocarbons NGL Company
El Paso Hydrocarbons Pipeline Company
El Paso Hydrocarbons Service Company
El Paso Hydrocarbons Transportation Company
El Paso Storage Company
Minera San Pedro Corralitos, SA.
Odessa Natural Gasoline Company
Odessa Pipeline Company
Pecos Company
Trebol Drilling Company
El Paso Moave Pipeline Company
El Paso Natural Gas Building Company
El Paso Natural Gas Clearinghouse Company
Maridean Petroleum Holding, Inc.
Maridean Oil Production, Inc. (formerly El Paso Exploration, Inc.) EPX Company
Maridean Oil, Inc. (formerly Milestone Petroleum Inc.)
Butte Pipeline Company
Northern Rockies Pipeline

Maridean Oil Trading, Inc.
Portal Pipeline Company
Maridean Oil Pipeline, Inc.

Missouri Pacific Railroad Company

Union Pacific Railroad Company

The Western Pacific Railroad Company

Union Pacific Corporation
Pacific Rail System, Inc.
Missouri Pacific Corporation
UP Sub, Inc.
Pacific Subsidiary, Inc.
Champlin Alaska Pipeline, Inc.
Champlin Gas Gathering, Inc.
Champlin Marketing, Inc.
Champlin Refining. Inc.
American Refrigerator Transit Company
Chicago Heights Terminal Transfer Railroad Company
Doniphan, Kensett & Searcy Railroad
Missouri Improvement Company
MP Redevelopment Corporation
Park Spring, Inc.
Stonegate Park, Inc.
Jefferson Southwestern Railroad Company
Southern Illinois and Missouri Bridge Company
The Alton & Southern Railway Company
MP Equipment Corporation
Missouri Pacific Truck Lines, Inc.
Brownsville & Matamoros Bridge Company
Missouri Pacific Air Freight, Inc.
Missouri Pacific Intermodal Transport, Inc.
Texas & Missouri Pacific Railroad Company
The Weatherford Mineral Wells and Northwestern Railway Company
Galveston, Houston and Henderson Railway Company
Houston Belt & Terminal Railway Company

Terminal Railroad Association of St. Louis
Trailer Train Company
Arkansas & Memphis Railway Bridge and Terminal Company
Kansas City Terminal Railway Company
The Belt Railway of Chicago
Penn Central Corporation
The Puebleo Union Depot and Railroad Company
Chicago & Western Indiana Railroad Company
Texas City Terminal Railway Company
Terminal Industrial Land Company
Great Southwest Railroad, Inc.
Wasatch Insurance Limited
UP Leasing Corporation
Union Pacific Finance N.V.
Union Pacific Foundation
Champlin Petroleum Company
Calnev Pipe Line Company
Champlin Gas Processing Company
Champlin Liquid Pipeline, Inc.
MKT Exploration Company
Champlin International Petroleum Company
Wamsutter Pipeline, Inc.
Champlin Petrochemicals, Inc.
CMT Ltd.
Champlin Pipeline, Inc.
Nueces Pipeline, Inc.
Harbor Service Stations, Inc.
Union Pacific Resources Corporation
Upland Industries Corporation
Unita Development Company
Union Pacific Land Resources Corporation
Upland Industrial Development Company
Quality Aggregate Company
Rocky Mountain Energy Company
Bitter Creek Coal Company
Elk Mountain Coal Company
Hanna Basin Coal Company

Kanda Development Company
Prospect Point Coal Company
Rock Springs Royalty Company
Champlin Trading Company
Champlin Midcontinent Crude Oil Pipeline, Inc.
Champlin Midcontinent Marketing, Inc.
Champlin Midcontinent Products Pipeline
Champlin Arguello Pipeline, Inc.
Panola Pipe Line, Inc.
Esperanza Pipeline Company
Champlin Canada, Ltd.
Union Pacific Resources, Ltd.
Overthrust Pipe Line, Inc.
Champlin Gas Pipeline, Inc.
R M Leasing Company
Winton Coal Company
Stauffer Chemical Company of Wyoming
Oregon Short Line Railroad Company
Camas Prairie Railroad Company
Los Angeles & Salt Lake Railroad Company
Des Chutes Railroad Company
Yakima Valley Transportation Company
Oregon-Washington Railroad & Navigation Company
Mount Hood Railway Company
Union Pacific Fruit Express Company
Union Pacific Motor Freight Company
Union Pacific Freight Services Company
Spokane International Railroad Company
The St. Joseph & Grand Island Railway Company
St. Joseph Terminal Railroad Company
The Ogden Union Railway & Depot Company
Portland Traction Company
Oakland Terminal Railway
Alameda Belt Line
Tidewater Southern Railway Company
Standard Realty and Development Company
WPX Freight System, Inc.
Delta Finance Company, Ltd.

Sacramento Northern Railway
Denver Union Terminal Railway
Portland Terminal Railroad Company
Longview Switching Company
Central California Traction Company

No. 86-39 (2)

In The

Supreme Court of the United States

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY, *et al.*,
Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.*, IN SUPPORT OF THE PETITION

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BRIEF OF RESPONDENTS BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.* IN SUPPORT OF THE PETITION

On July 15, 1986, petitioner Burlington Northern Railroad Company, and seven other railroads, filed a petition with this Court for the issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment of that Court in *Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employes,* 793 F.2d 795 (7th Cir. 1986). Because the respondent union believes that the issues raised by the railroads' petition need to be resolved finally and conclusively by this Court so that improvidently issued injunctions never again deprive a labor organization of its full economic power at a time when that power is clearly

needed, respondents Brotherhood of Maintenance of Way Employes [hereinafter, "BMWE"], *et al.*,[1] support the issuance of the writ, albeit for reasons different than those advanced by petitioners.

OPINIONS BELOW

The opinion of the court of appeals has been reported at 793 F.2d 795. To respondents' knowledge, the opinion of the district court is not officially reported.

COUNTERSTATEMENT OF THE CASE

Although respondents do not fully agree with petitioners' statement of the case, including their description of the operation of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, that statement, in respondents' opinion, adequately explains the factual setting in which this case has arisen. Consequently, respondents do not consider it necessary to correct what it believes are several inaccurate and, in some cases, omitted, statements. Rule 34.2 of the Rules of this Court. However, several events have occurred since the petition was filed which, in respondents' opinion, are relevant to the Court's consideration of this petition.

On July 21, 1986, the status quo mandated by Section 10 of the Railway Labor Act, 45 U.S.C. § 160, expired, and respondent BMWE was free once again to exercise its right of self-help to resolve its disputes with the Maine Central Railroad and Portland Terminal Company [hereinafter, "MEC" and "PT," respectively] over the modification of various agreements. Respondent BMWE did

[1] Respondents are the International Union and 17 individuals who are either officers of the International or of its subordinate units. The individual respondents are listed at page ii of the railroads' Petition.

not exercise that right, but rather, instructed its members to continue to work while their union sought to negotiate a resolution of the disputes. Notwithstanding the union's forebearance, the MEC and PT imposed new work rules on August 6, 1986, which reduced the rates of pay by 20%, required employees to pay 50% of their health and welfare benefits, and promulgated other changes to the employees' working conditions. *See,* 132 Cong. Rec. H6000 (Remarks of Rep. Snowe); H. Rpt. No. 99-784, 99th Cong., 2d Sess. at 4 (1986). Respondent BMWE successfully continued to urge its members not to strike, and responded to the new work rules and rates of pay by filing suit against the MEC and PT in the United States District Court for the District of Maine (*BMWE v. MEC,* D. Me. Civil Action No. 86-0251-P) to enjoin the changes made by those railroads. Respondent BMWE's request for a Temporary Restraining Order was denied on August 11, 1986.

On August 12, 1986, Congress intervened in this matter and passed a Joint Resolution (H.J. Res. 683, 99th Cong., 2d Sess.; 132 Cong. Rec. H5998-6001 and S11427-28 (August 12, 1986)) which extended the status quo that existed on July 20, 1986, for a sixty day period; that is, until September 18, 1986.[2] That Joint Resolution was signed by the President on August 21, 1986.[3] Consequently, at the present time respondent BMWE may not engage in self-help activities to resolve its major disputes

[2] That Joint Resolution has been reproduced herein as Appendix A for the convenience of this Court. Besides extending the Section 10 status quo period, the Resolution created a 3 member board to report to the Congress not later than 10 days prior to the expiration of the 60 day extension. App. A at § 2.

[3] On August 22, 1986, the MEC and PT filed suit in the United States District Court for the District of Maine against the BMWE seeking a declaratory judgment that the Joint Resolution violates the Constitution of the United States, in particular, the Due Process clause of the Fifth Amendment and the Separation of Powers doctrine. The MEC and PT are also seeking an injunction to prevent respondent from enforcing that law. *MEC v. BMWE,* D. Me. Civil Action No. 86-0263-P.

with the MEC and PT. However, unless an agreement is reached which resolves these disputes, or unless Congress once again intervenes, as of 12:01 a.m. on September 18, 1986, respondent BMWE will no longer be restrained by the Railway Labor Act from exercising its right to self-help, including its right to engage in secondary picketing.

REASONS FOR GRANTING THE WRIT

1. Effective collective bargaining is clearly dependent upon mutual respect for the strength of the other parties' economic power, and once one party believes that it can withstand the other's economic power with little or no serious economic consequences, the very foundation of collective bargaining is threatened. The temptation to test what is perceived to be a superior strength will lead to a desire to force changes in rates of pay, rules or working conditions, rather than accomplish those changes by exerting every reasonable effort to reach an agreement on those proposed changes. *See,* 45 U.S.C. § 152, First. Respondents respectfully submit that the Railway Labor Act was premised on the assumption that labor's and management's economic powers were equally balanced. *See generally, Texas & New Orleans R.R. v. Brotherhood of Railway Clerks,* 281 U.S. 548, 570-71 (1930).

Unfortunately, for at least the past twenty years, our nation's railroads have been questioning rail labor's ability to maintain a strike and have been devising various strategisms to strengthen their own ability to outlast a strike action. Such strategisms include, for example, a mutual aid arrangement by which railroads which are not being picketed reimburse the railroads experiencing job actions for their lost revenues.[4] Also, technological

[4] While respondent BMWE reasonably believed from reports which it had received that the Guilford Rail System (*i.e.,* the rail system which controls MEC and PT) was participating in a mutual aid arrangement with

(footnote continues)

changes have enabled the railroads to rely more heavily upon their supervisory forces to continue train operations during strikes. These strategisms and technological changes have led to a belief that a railroad can operate successfully *through* a strike, and this, in turn, has led to more rigid bargaining by rail management. This form of bargaining has increased the threat of strikes in the rail industry.

In order to counter rail management's belief that rail strikes can be outlasted with acceptable costs, rail labor has called upon rail employees on railroads which are not being struck to support the employees who are on strike. This case presents such a situation of a call for rail labor solidarity and it brings into question two crucial issues: (1) whether Congress, in enacting the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.,* has withdrawn from federal courts the power to enjoin rail labor's peaceful request for mutual aid; and (2) whether such a call for aid is unlawful under the Railway Labor Act. Respondent BMWE agrees with petitioners that these questions are extremely important to the rail industry today, for the validity of rail labor's ability to ban together for its mutual aid and protection clearly affects rail labor's bargaining power and the entire collective bargaining process in the rail industry today.

(footnote continued)

petitioners, petitioners have denied such a connection with the Guilford system, and respondents have no concrete evidence which disputes that denial. However, the record in this case shows that a mutual aid plan exists among petitioners and most of the major railroads of this country, although MEC and PT are not participants. Affidavit of J.J. Marchant in N.D. Ill. No. 86-C-2486. The magnitude of that arrangement may be seen from the fact that in 1978 during the strike by the Brotherhood of Railway and Airline Clerks against the Norfolk & Western Railway, it was estimated that the Norfolk & Western was receiving approximately $800,000 per day in strike insurance payments. *See,* The Washington Post, September 27, 1978 at A14, Col. 2.

2. Petitioners maintain, albeit erroneously, that secondary picketing is prohibited by the Railway Labor Act, and that Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, notwithstanding its literal language, does not deprive federal courts of jurisdiction to enjoin peaceful secondary picketing. While those arguments have been rejected by the Seventh Circuit in this case, and by the three other circuits which have addressed these and comparable arguments in the past few months,[5] the fact remains that two circuits—*i.e.*, the Fifth [6] and Eighth [7]—have previously adopted interpretations of the Norris-LaGuardia Act which enable federal courts to examine the wisdom of a union's decision to engage in secondary picketing, again notwithstanding the plain language of the Norris-LaGuardia Act which prohibits any

[5] Respondent BMWE's position that it has a right to engage in peaceful secondary picketing in the rail industry without fear of an injunction has been upheld by the following appellate courts, besides the Seventh Circuit: *Richmond, F.&P. R.R. v. BMWE,* 4th Cir. No. 86-3544, decided July 11, 1986, *Norfolk & W. Ry. v. BMWE,* 4th Cir. No. 86-3555, decided July 11, 1986, *pet. for cert. pending,* Sup. Ct. No. 86-175; *Central Vermont Ry. v. BMWE,* 793 F.2d 1298 (D.C. Cir. 1986); *Consolidated Rail Corp. v. BMWE,* 792 F.2d 303 (2d Cir. 1986). These issues are pending before the First Circuit in *BMWE v. Guilford Transportation Industries, Inc.,* 1st Cir. No. 86-1366, and before the Third Circuit in *Pittsburgh & L.E. R.R. v. BMWE,* 3rd Cir. No. 86-3321 (held in abeyance pending decision by district court on motion to dismiss or to transfer).

[6] *Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R.,* 362 F.2d 649 (5th Cir.), *aff'd by an equally divided Court,* 385 U.S. 20 (1966).

[7] *Ashley, Drew & Northern Ry. v. UTU,* 625 F.2d 1357 (8th Cir. 1980). Although petitioners maintain that *Ashley Drew* and *Atlantic Coast Line* both adopted the "substantial alignment" test, that is incorrect, for the *Atlantic Coast Line* court's "economic self-interest" test is much broader; while its test was satisfied in that case by a substantial alignment between carriers, it was also satisfied by the interests of the employees whose aid was being sought because of their economic interests which would be affected by a resolution of the primary dispute. 362 F.2d at 655. As the Seventh Circuit observed in the case at bar, neither test is found in the Norris-LaGuardia Act, for Congress left it up to the unions and to the employees in the rail industry on whom the call for help is made to determine if such a call is within their economic self-interest. BN Pet. at 22a-23a.

such inquiry into union motivation. Even though this Court has concluded that such an inquiry into union motivation is contrary to the Norris-LaGuardia Act (*e.g., Jacksonville Bulk Terminals, Inc. v. ILA,* 457 U.S. 702, 715-20 (1982); *see also, Order of Railroad Telegraphers v. Chicago & North Western Ry.,* 362 U.S. 330, 335-36 (1960)), the law as it exists today in at least three circuits [8] enables the railroads to ask federal courts in those circuits, and in the four other circuits which have not addressed this issue,[9] to make such an inquiry. In view of the predisposition of many trial courts to enjoin rail picketing unless it is clearly authorized (*see generally,* BN Pet. at 40a-43a), rail labor still faces the very real potential of having legitimate calls for secondary pressure improvidently enjoined in several circuits.

The impact of federal court intervention on respondent BMWE's recent efforts to engage in secondary picketing shows very clearly the need for a uniform rule on the issues presented by this petition. Respondent sought to engage in secondary picketing against non-Guilford railroads (see note 4, *supra*) in early April 1986, but was enjoined by three separate district courts from picketing major carriers.[10] While two of the district courts were

[8] Since the *Atlantic Coast Line* case was decided by the Fifth Circuit before the Eleventh Circuit was formed, that case also governs the Eleventh Circuit. *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981)(en banc).

[9] The Ninth Circuit, in a non-railroad case, rejected the *Atlantic Coast Line* and *Ashley Drew* tests in *Smith's Management Corp. v. IBEW,* 737 F.2d 788 (9th Cir. 1984).

[10] Respondent was enjoined by the district courts for the Western District of New York (*Conrail* case; preliminary injunction issued April 6), for the Northern District of Illinois (*BN* case; TROs issued April 9, 10 and 11; preliminary injunction issued April 23) and by the Western District of Virginia (*Norfolk & Western* case; TRO issued April 11; preliminary injunction issued April 22).

considering whether to grant preliminary injunctions to replace their Temporary Restraining Orders, the National Mediation Board [hereinafter, "NMB"] recommended to the President that he create an Emergency Board under Section 10 of the Railway Labor Act to investigate the BMWE's disputes with the MEC and PT. But for the first time in the history of the Railway Labor Act, the President did not act immediately on the NMB's recommendation. *See,* H. Rpt. No. 99-784, *supra,* at 3. Instead, as the White House explained in its press release which accompanied the Executive Order which finally created the Emergency Board in this case on May 16, 1986 (*i.e.,* Executive Order No. 12,557, 51 Fed. Reg. 18,429 (1986)), the President delayed creating the Emergency Board because the federal courts had enjoined secondary picketing of the major carriers and, thus, had prevented the disruption to commerce from rising to the level which, in the President's opinion, justified his intervention. White House Press Release of May 16, 1986 at 1, reproduced hereto as Appendix B at 1-2. On May 15, 1986, the Second Circuit stayed the injunction prohibiting picketing of Conrail, and on May 16, 1986, the President created the Emergency Board after respondent began to picket that carrier. *Id.* at 2-3.

This factual history shows that the strike, and its impact both on employees and on the Northeast portion of this Country, was extended by over one month by injunctions which were subsequently found to have been issued improvidently. While the courts which issued those injunctions may have protected the major carriers which sought federal court assistance, those courts, nevertheless, in effect ignored the impact of the strikes on other portions of the rail system and, more important, frustrated the statutory scheme which Congress has established to protect the overall public interest—*e.g.,* Section 10 of the Railway Labor Act.

In 1932, Congress informed the judiciary when it enacted the Norris-LaGuardia Act, that the federal courts were no longer to be engaged in the "labor injunction business." *E.g., Marine Cooks & Stewards v. Panama Steamship Co.,* 362 U.S. 365, 369 (1960). If the district courts had heeded that admonition in this case and in other rail strikes in which the issue of secondary picketing has arisen (*e.g., Alton & Southern Ry. v. BRAC,* 99 L.R.R.M. 2323 (D.D.C.), *aff'd* 99 L.R.R.M. 3326 (D.C.Cir.), *cert. denied,* 439 U.S. 996 (1978)), lengthy strikes could have been shortened by about 50%. Moreover, if the railroads knew that they could not look to the federal courts to enjoin secondary picketing, the need for rail labor to engage in self-help may never have arisen in the first place.

Respondent BMWE respectfully submits that so long as there is a split in the circuits on the test to be applied to determine whether the federal courts are still in the labor injunction business—*i.e.,* whether the literal terms of the Norris-LaGuardia Act apply, or whether the federal courts can apply a judge-made exception to the literal terms chosen by Congress—railroads will seek the aid of the federal courts to enjoin conduct which Congress deliberately has left unregulated and immune from federal court injunctions. Consequently, as it stated in its earlier filings with this Court on these issues (*i.e.,* Sup. Ct. Nos. 85-1792 and 85-1852), respondent BMWE urges this Court to grant a writ of certiorari in this case to review and to affirm the Court of Appeals' decision.[11]

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[11] While it is impossible to predict at this time what will happen on or after September 18 when the extension of the status quo expires, it is clear that this case will not be moot. Even if a settlement of the primary disputes is reached, the issues in this case are obviously capable of repetition in factual situations which evade review because of the short life span of most rail labor strikes. *E.g., Roe v. Wade,* 410 U.S. 113, 125 (1973); *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515 (1911).

CONCLUSION

Respondents BMWE, *et al.*, respectfully submit that the writ of certiorari should be granted.

Respectfully submitted,

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Date: August 29, 1986

APPENDIX A

Ninety-ninth Congress
of the
United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday,
the twenty-first day of January,
one thousand nine hundred and eighty-six

H. J. Res. 683
JOINT RESOLUTION

To provide for a temporary prohibition of strikes or lockouts with respect to the Maine Central Railroad Company and Portland Terminal Company labor-management dispute.

Whereas the labor dispute between the common rail carriers, Maine Central Railroad Company and Portland Terminal Company, and certain of the employees of such carriers represented by the Brotherhood of Maintenance of Way Employees threatens essential transportation services of the Nation;

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained;

Whereas the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers;

Whereas it is desirable to resolve such dispute in a manner which encourages solutions reached through collective bargaining;

Whereas the President, pursuant to section 10 of the Railway Labor Act (45 U.S.C. 160), by Executive Order No. 12557 of May 16, 1986, created a Presidential Emergency Board to investigate the dispute and report findings;

Whereas the recommendations of Presidential Emergency Board No. 209 for settlement of such dispute have not yet resulted in a settlement; and

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the final paragraph of section 10 of the Railway Labor Act (45 U.S.C. 160) shall apply and be extended for an additional period of 60 days beginning on July 21, 1986, with respect to the dispute referred to in Executive Order No. 12557 of May 16, 1986, so that no change, except by agreement, shall be made by the common rail carriers, Maine Central Railroad Company and Portland Terminal Company, or by the employees of such carriers in the conditions out of which such dispute arose as such conditions existed before 12:01 ante meridiem of March 3, 1986.

SEC. 2. (a) Not later than 10 days prior to the expiration date of the 60-day period referred to in the first section of this joint resolution the board established under subsection (b) shall submit to the Congress a full and comprehensive report containing—

(1) the progress, if any, of negotiations between the common rail carriers, Maine Central Railroad Company and Portland Terminal Company, and the employees of such carriers represented by the Brotherhood of Maintenance of Way Employees;

(2) findings of fact regarding financial and other circumstances related to the dispute described in this resolution, including, but not limited to, developments since March 3, 1986; and

(3) recommendations for a proposed solution of the dispute described in this resolution, including, but not limited to, the issues covered by Presidential Emergency Board Number 209.

(b) The National Mediation Board shall appoint a three-member board for the purpose of preparing and submitting the report described in subsection (a). No member appointed to

such board shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of such members shall be fixed by the National Mediation Board. The second paragraph of section 10 of the Railway Labor Act shall apply to the expenses of the board established under this subsection as if such board were a board created under such section 10.

(c) The board appointed under subsection (b) shall terminate upon the submission to the Congress of the report required under subsection (a).

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.

APPENDIX B

THE WHITE HOUSE
Office of the Press Secretary

For Immediate Release May 16, 1986

The President announced today that he has established, effective May 16, 1986, Presidential Emergency Board No. 209, to investigate and make recommendations for settlement of current disputes between the Brotherhood of Maintenance of Way Employes (BMWE) and the Maine Central Railroad/Portland Terminal Company.

The Maine Central Railroad/Portland Terminal are owned by Guilford Transportation Industries, which also owns the Boston & Maine and Delaware & Hudson railroads. Most of the traffic handled by the Guilford railroads, which are concentrated within the northeast section of the United States, originates on other rail carriers and is transferred to the Guilford lines at key interchange points. The Guilford roads interline traffic with several other major railroads, including Conrail, CSX, and Norfolk Southern.

A strike called by the BMWE against the Maine Central/ Portland Terminal subsequently spread to the other Guilford railroads. A further escalation of the dispute occurred in April when the BMWE initiated a class action suit against the Association of American Railroads contending that certain railroads had provided Guilford assistance under a mutual aid arrangement. Picketing was initiated by the BMWE on April 10, 1986, against selected railroads outside the Guilford system. However, as a result of considerable litigation following this escalation in the job action, several Federal courts issued orders restraining the BMWE and other unions from picketing. Important issues under the Federal labor laws have been presented in these cases, the speedy and final resolution of which is of great importance to labor-management relations in this industry and to the efficient movement of rail traffic in interstate commerce. The recent conflicting decisions of the

Federal courts, permitting in some cases picketing of carriers not involved in the basic dispute, however, made Presidential emergency action necessary in the interim.

Three Federal court jurisdictions have permitted picketing by the BMWE of railroads outside the Guilford system. The Central Vermont Railway was denied a preliminary injunction by the United States District Court and the United States Court of Appeals for the District of Columbia. The Richmond, Fredericksburg and Potomac Railroad was denied a preliminary injunction on appeal before the United States Court of Appeals for the Fourth Circuit, and most importantly, Conrail was denied injunctive relief on May 15, 1986 , when the United States Court of Appeals for the Second Circuit dissolved an injunction granted on suit by Conrail.

Conrail operates 13,400 miles of lines in 15 Northeast States as well as the District of Columbia and Canada. In 1985, Conrail was involved in transporting 15 percent of all traffic loaded by the nation's railroads. In the Northeast alone, Conrail accounts for over 30 percent of all freight loaded by rail. It also provides connecting service with almost all major railroads operating in the South and West. More than half of Conrail's traffic is carried in connection with other railroads, as part of joint-line movements. Over one million carloads each year move onto Conrail lines from another railroad, and close to half a million carloads are forwarded by Conrail to another railroad. The effects of a strike against Conrail would therefore extend to most other large carriers throughout the country, even if they were not directly involved in the strike itself.

Picketing by BMWE employees of the Conrail system, including such key points as Chicago, Illinois, St. Louis, Missouri, Cleveland, Ohio, Buffalo, New York, and Elkhart, Indiana, began on May 15, 1986. This action, if continued, could result in layoffs of 80,000 workers in key rail-served industries within the first two weeks and a total of 135,000 workers if the strike continued for a full month, in addition to the 35,000 nonmanagement employees of Conrail. Beyond the loss of revenues to the railroad, the strike would halt production of approximately $85 million worth of goods per day and could

mean layoffs of 65,000 in motor vehicles manufacturing, 30,000 in steelmaking and other primary metals production, and 10,000 each in coal mining, chemicals production, and the pulp and paper industries. A strike against Conrail would also halt Amtrak passenger trains carrying 45,000 travelers each week —approximately ⅛ of total Amtrak intercity passengers.

Consequently, the President invoked the emergency board procedures of the Railway Labor Act, which in part provide that the board will report its findings and recommendations for settlement to the President within 30 days from the date of its creation. The parties must then consider the recommendations of the emergency board and endeavor to resolve their differences without engaging in self-help during a subsequent 30-day period. It is not anticipated that the creation of the emergency board will inhibit the prompt and final resolution of the important issues of Federal labor law pending in connection with this dispute.

No. 86-39

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BURLINGTON NORTHERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, BALTIMORE AND OHIO CHICAGO TERMINAL COMPANY, CHESAPEAKE AND OHIO RAILWAY COMPANY, and CSX TRANSPORTATION, INC.,

Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-39

BURLINGTON NORTHERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, BALTIMORE AND OHIO CHICAGO TERMINAL COMPANY, CHESAPEAKE AND OHIO RAILWAY COMPANY, and CSX TRANSPORTATION, INC.,

Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' SUPPLEMENTAL BRIEF

On July 15, 1986, seven of the Nation's major railroads filed a petition with this Court seeking review of a decision of the United States Court of Appeals for the Seventh Circuit holding that the Norris-LaGuardia Act,

29 U.S.C. § 101 *et seq.*, precluded federal courts from enjoining secondary picketing against rail carriers no matter how remote the connection between the primary employer and the picketing victims. On August 29, 1986, the respondent union, recognizing the substantial importance of the issues raised and the sharp intercircuit conflict over those issues, filed a brief in support of the petition.

On September 30, 1986, President Reagan signed into law[1] a joint resolution passed by Congress[2] (a copy of which is attached hereto as Appendix A) seeking to resolve the primary labor dispute giving rise to the secondary picketing involved in this case. The resolution calls for the imposition of recommendations made by Presidential Emergency Board 209[3] and an advisory board created pursuant to a prior joint resolution.[4] The two boards had recommended that the primary employers, the Maine Central and Portland Terminal Railroads, award severance pay to released employees and adopt nationally negotiated wage and health and welfare benefits.

The primary employers have stated publicly their view that S.J. Res. 415 does not settle the primary dispute because the measure is "unconstitutional and discriminatory".[5] Consistent with that view, Maine Central and Portland Terminal have initiated an action seeking to enjoin enforcement of the resolution. *Maine Cent. R. Co.* v.

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[1] Pub. L. No. 99-431.

[2] S.J. Res. 415, 99th Cong., 2d Sess. (1986).

[3] On May 16, 1986, President Reagan issued Executive Order No. 12557, convening an Emergency Board under Section 10 of the Railway Labor Act, 45 U.S.C. § 160.

[4] H.J. Res. 683, 99th Cong., 2d Sess. (1986).

[5] "House Acts on Labor Dispute Issue," *The Journal of Commerce*, p. 6a (Sept. 24, 1986).

BMWE, C.A. No. 86-0311P (D. Me.), S.J. Res. 415 does not prohibit or make any mention of secondary picketing. In addition, there are over four dozen disputes between the primary employers and their labor organizations presently docketed and pending before the National Mediation Board and which are not covered by S.J. Res. 415. Accordingly, a threat of secondary picketing against petitioners and other railroads arising out of the dispute between Maine Central/Portland Terminal and BMWE remains in effect.

Moreover, even if S.J. Res. 415 were to resolve the primary dispute, review of the Seventh Circuit's decision by this Court would still be necessary and appropriate—a conclusion with which respondents, as well as petitioners agree. This Court has long held that its jurisdiction is not eliminated if the underlying dispute between the parties is one "capable of repetition, yet evading review." See, *e.g.*, *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 125 (1974); *Roe* v. *Wade*, 410 U.S. 113 (1973); *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). In particular, in the context of labor disputes, where "the great majority of economic strikes do not last long enough for complete judicial review of the controversies they engender," this Court has made clear that "[t]he judiciary must not close the door to the resolution of the important questions" so long as the underlying dispute is likely to recur. *Super Tire Engineering*, 416 U.S. at 126-27.

Here, the fundamental questions of whether secondary picketing against railroads is lawful and whether it may be enjoined by federal courts are not merely capable of repetition, but will inevitably recur vis-à-vis these petitioners as well as other railroads. Under the Seventh Circuit's decision, any railway union that has exhausted its remedies against the primary employer under the Railway Labor Act, has the absolute right to picket railroads throughout the country in order to pressure the

primary employer into settling or to raise the stakes in such a way that the President and Congress must intervene to force a settlement. It is inconceivable that this powerful economic weapon will be left unused in future railway labor disputes.

Yet, the fundamental issues raised in this case could easily continue to evade review. Railroad strikes generally are of relatively short duration, even compared to other labor disputes, because of the means provided under the Railway Labor Act for Presidential intervention. See 45 U.S.C. § 160.[6] In addition, Congress often intervenes in railway labor disputes because of the significant adverse effects railroad strikes have on interstate commerce. In this case, S.J. Res. 415 has been enacted at the eleventh hour of this Court's consideration of this petition—a pattern which is likely to recur whenever the union increases the national significance of the dispute by expanding or threatening to expand it to secondary employers in the future.

The Court will never have a case whose facts present the legal issues more clearly than they are presented here. Those issues are before the Court; they need to be decided and the Court should decide them now.

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[6] As the President recognized in establishing Presidential Emergency Board No. 209, secondary picketing of the Nation's major railroads for even a few days would have a devastating and crippling effect on the Nation's economy. *See* White House Press Release Establishing Presidential Emergency Board No. 209, dated May 19, 1986 (attached as Appendix B to Brief of Respondents).

CONCLUSION

For the foregoing reasons, and for the reasons stated both in the Petition and in the Brief of Respondents, the Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

SJRes. 415 follows: (TEXT)

Whereas the labor dispute between the common rail carriers, Maine Central Railroad Company and Portland Terminal Company, and certain of the employees of such carriers represented by the Brotherhood of Maintenance of Way Employees threatens essential transportation services of the Nation;

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained;

Whereas the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers;

Whereas the President by Executive Order no. 12557 of May 16, 1986, pursuant to the provisions of section 10 of the Railway Labor Act (45 U.S.C. 160), created a Presidential Emergency Board to investigate the dispute and report findings;

Whereas the recommendations of Presidential Emergency Board No. 209 for settlement of such dispute have not yet resulted in a settlement;

Whereas the extension of the provisions of section 10 of the Railway Labor Act (45 U.S.C. 160) for an additional 60-day period to such dispute provided by the joint resolution entitled "Joint Resolution to provide for a temporary prohibition of strikes or lockouts with respect to the Maine Central Railroad Company and the Portland Terminal Company labor-management dispute", approved August 21, 1986 (Public Law 99-385), has not yet resulted in a settlement of such dispute;

Whereas the advisory board established pursuant to section 2 of such joint resolution recommended that in the

event that the parties to the dispute were unable to reach agreement on the dispute before September 13, 1986, the Congress should enact legislation directing the parties to accept and apply the recommendations of Emergency Board No. 209, and if such parties are unable to agree as to all necessary details in applying the recommendations of such Emergency Board, all such unsettled issues should be submitted to final and binding arbitration;

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not yet resulted in settlement of the dispute;

Whereas the Congress, under the Commerce Clause of the Constitution, has the authority and responsibility to ensure the uninterrupted operation of essential transportation services; and

Whereas the Congress in the past has enacted legislation for such purposes: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following conditions shall apply to the dispute referred to in Executive Order No. 12557 of May 16, 1986, between the common rail carriers, Maine Central Railroad Company and Portland Terminal Company (hereafter in this resolution referred to as the "carriers") and the employees of such carriers represented by the Brotherhood of Maintenance of Way Employees.

(1) The parties to such dispute shall take all necessary steps to restore or preserve the conditions out of which such dispute arose as such conditions existed before 12:01 ante meridiem of March 3, 1986, except as provided in paragraphs (2) through (4).

(2) The report and recommendations of Presidential Emergency Board No. 209 shall be binding on the

parties and shall have the same effect as though arrived at by agreement of the parties under the Railway Labor Act (45 U.S.C. 151 et. seq.), except that nothing in this joint resolution shall prevent a mutual written agreement by the parties to any terms and conditions different from those established by this joint resolution.

(3) (A) If there are unresolved implementing issues remaining with respect to the report and recommendations or agreement under paragraph (2) after 10 days after the date of the enactment of this joint resolution, the parties to the dispute shall enter into binding arbitration to provide for a resolution of such issues.

(B) The National Mediation Board established by section 4 of the Railway Labor Act (45 U.S.C. 154) shall appoint an arbitrator to resolve the issues described in subparagraph (A). Except as provided in this joint resolution, such arbitration shall be conducted as if it were under section 7 of such Act, and any award of such arbitration shall be enforceable as if under section 9 of such Act.

(1) Within 30 days after the date of the enactment of this joint resolution, the binding arbitration entered into pursuant to paragraph (3) shall be completed. (End of Text)

(3)

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BALTIMORE AND OHIO CHICAGO TERMINAL COMPANY,
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WAY EMPLOYES, *et al.*,
Respondents.

BRIEF OF THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF BURLINGTON NORTHERN RAILROAD COMPANY'S PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Petitioners and *Amicus Curiae*, the National Railway Labor Conference, urge this Court to grant the Petition for a Writ of Certiorari. Respondents have escalated a local dispute, which directly concerns only 110 employ-

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* Letters of consent from all parties to the filing of this brief have been filed with the Clerk of this Court.

ees and a small railroad in a remote part of the country, into a conflict which threatens to disrupt the national system of rail transportation. The escalation has been accomplished by means of picketing against railroads who are strangers to the underlying dispute and are powerless to hasten its end.[1]

The Conference respectfully submits that the escalation of the primary labor dispute has given rise to numerous lawsuits that, in turn, have created uncertainty about the legal limits of economic self-help in a railway labor dispute and the injunctive power of the federal judiciary to vindicate the objectives of the Railway Labor Act and related legislation. The uncertainty is manifested by a split among the federal courts of appeals, which cannot agree upon the intention of Congress regarding secondary boycotts under the Railway Labor Act. The need for a definitive interpretation of the Railway Labor Act and its relationship to the Norris-La Guardia Act are issues of first importance to rail carriers, the labor organizations that represent their employees, and the public that depends on rail transportation. Until the questions presented by this case are answered, the railroad and airline industries will function in a state of uncertainty that will disrupt ongoing collective bargaining and imperil labor relations stability.

INTEREST OF AMICUS CURIAE

Virtually all of the nation's Class I railroads are members of the National Railway Labor Conference ("NRLC" or "Conference"). The Conference is the multiemployer

[1] The Court has often addressed the "primary-secondary" distinction under Taft-Hartley. *International Union of Elec. Wkrs. v. NLRB (General Elec.)*, 366 U.S. 667 (1961). In its simplest form, the secondary boycott is characterized by economic "sanctions [which] bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it." *Id.* at 672 (*citing, International Bhd. of Elec. Wkrs. v. NLRB*, 181 F.2d 34, 37 (2d Cir. 1950)).

representative of its member railroads both in national collective bargaining with unions pursuant to the Railway Labor Act and in regard to other labor-management relations problems that are of concern to the railroads generally. In addition, the Conference serves as a clearinghouse for labor relations information and advises and assists its member railroads about the system established by the Railway Labor Act to adjust disputes arising out of workplace grievances or the interpretation of collective bargaining agreements.

The Conference requests that the Court grant the instant Petition and respectfully submits that its statement in support is desirable because it will more fully apprise the Court of the nationwide impact of the issue before it. The Conference's participation will also more fully inform the Court of the danger posed by Respondent's picketing to the national transportation system and the economy which depends upon it for survival.

BACKGROUND

The Brotherhood of Maintenance of Way Employees ("BMWE") represents approximately 110 active railroad workers employed by Maine Central Railroad ("MEC") and the Portland Terminal Co. ("PT"), small local rail carriers located in Maine. The BMWE contract with MEC/PT reopened in 1984, and the parties began negotiations aimed at a new contract on rates of pay, rules and working conditions. By March 3, 1986, the parties had exhausted the major dispute resolution procedures of the Railway Labor Act. The BMWE commenced a lawful strike against the carrier, and later, its corporate affiliates, the Boston & Maine and the Delaware & Hudson. The union was unable to force MEC to capitulate through its use of a primary strike. In the spring of 1986, the BMWE attempted to ratchet up the pressure by picketing third-party, neutral employers in an admittedly secondary campaign of economic warfare. The eco-

nomic pressure exerted upon neutral employers as far away as California, would disrupt the flow of commerce throughout the nation and, as a by-product, economically asphyxiate the BMWE's diminutive opponent. The union apprised the Conference of its plans in a letter of April 8, 1986, in which its President expressed the intention of shutting down "the national rail system."

On May 15, 1986, BMWE commenced picketing at the facilities of the Consolidated Rail Corporation ("Conrail"), and caused substantial disruption to Conrail's operations. Confronted with the threatened shutdown of Conrail as well as other rail carriers, the President of the United States adopted the recommendation of the National Mediation Board and issued an Order appointing an Emergency Board in accordance with the discretion conferred upon him by § 10 of the Railway Labor Act. The Board's mandate was to assist the parties in resolving their dispute. *See* Executive Order No. 12557, appended hereto as Attachment 1. The Railway Labor Act required both parties to maintain the status quo by refraining from all further self-help until July 21, 1986.[2] At that time the parties were free, if so inclined, to resume their posture "at each others' throats," [3] or, in the case of the BMWE, at the throat of any other railroad it sees fit to entangle in its struggle. To date the combat has not resumed, nor has the dispute been settled.

Prior to the establishment of the Emergency Board, Petitioners had successfully urged the United States District Court for the Northern District of Illinois to issue

[2] The President appointed the members of the Emergency Board on May 23. The Board issued its recommendations to the President on June 21, initiating another 30-day cooling off period in which all self-help or other displacement of the status quo is forbidden. *See* 45 U.S.C. § 160; Exec. Order No. 12557, 51 Fed. Reg. 18,429 (1986), Attachment 1.

[3] *Burlington N. R.R. Co. v. BMWE*, No. 86-166, Pet'n at 4a (7th Cir. June 4, 1986).

a preliminary injunction forbidding BMWE from picketing them as neutral parties unconnected with the dispute. On June 4, 1986, however, the Seventh Circuit reversed the district court, vacating the injunction. *Burlington N. R.R. Co. v. Brotherhood of Maint. of W. Employes*, No. 86-166, slip op. (7th Cir. June 4, 1986). Although the BMWE has not yet resumed its secondary boycott activity, the Court of Appeals' decision to vacate the injunction removes the only legal obstacle to its use. The Conference respectfully requests this Court to grant the petition for certiorari and to resolve the troublesome uncertainty surrounding the relationship of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, and the Railway Labor Act in the context of secondary picketing, and the meaning to be imputed to the absence of any express provision in the Railway Labor Act addressing secondary picketing.

THE DECISION OF THE COURT OF APPEALS WILL DESTABILIZE LABOR RELATIONS IN THE RAILROAD INDUSTRY.

The important national goal of stable labor relations in the railroad industry is accomplished through a complex collective bargaining procedure established by the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.* The RLA provides for resolution of disputes over the establishment or modification of rates of pay, rules and working conditions ("major disputes") by requiring the employer and the labor organization representing a craft or class of its employees to provide notice of the intended change, negotiate over it, take part in government-controlled mediation if it is requested of or proffered by the National Mediation Board ("NMB") and, finally, to participate in a Presidential Emergency Board investigation if the dispute threatens to deprive a region of the country of essential transportation servcice. All of these procedures must be exhausted before either the rail carrier or the labor organization can use economic self-help to force

acceptance of its demands. *See Detroit & T.S.L.R.R. v. United Transp. Union*, 396 U.S. 142 (1969).

During the sixty years that have followed passage of the Railway Labor Act, labor and management have evolved their own procedures within the parameters of the statute to deal with the major disputes that occur in the industry. *Elgin, J & E. R. v. Burley*, 325 U.S. 711, 752-753 (Frankfurter, J. dissenting) (1945), *accord*, *International Ass'n of Machinists v. Street*, 367 U.S. 740, 750-60 (1961) (analogizing to the NLRA). The number of these disputes is considerable. The NMB has reported that as of 1982, there were approximately 7200 individual railroad industry labor agreements on file with the Board, and the number is growing. There were 1000 more in 1982 than in 1975. 48 NATIONAL MEDIATION BOARD ANN. REP., 64 (1982). These written agreements represent only the fraction of major disputes that are resolved by written agreements submitted to the NMB pursuant to Section 5(e) of the RLA. *See* 45 U.S.C. § 155(e).

Some issues are negotiated on a multiemployer basis. These national negotiations are traditionally conducted by the National Railway Labor Conference on behalf of most of the major railroads in the United States. In these negotiations, which take place with individual unions or groups of aligned unions, the parties set wage rates and other basic rules and working conditions. *See Brotherhood of R. Trainmen v. Atlantic Coast Line R.R.*, 383 F.2d 225 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968); *Chicago B. & Q. R.R. v. Railway Employee Department*, 301 F. Supp. 603 (D.D.C. 1969). Other elements of the employment relationship are negotiated on an individual carrier basis. In turn, some of these subjects are negotiated on a carrier or system-wide basis and others are resolved by an agreement that is applicable to a work site or local area. At any point in time, there are hundreds of pending major disputes in the railroad industry at various stages in the collective bargaining process.

This tradition of continual collective bargaining in the railroad industry[4] exists in delicate harmony with the first-stated purpose of the RLA: "To avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. § 151a. This method of bargaining has evolved and endured because the parties have predictable expectations about the bargaining procedure and the economic self-help that is permissible if the procedure does not result in an agreement.

The decision of the Court of Appeals in the *Burlington Northern* litigation has unsettled the expectations that undergird the collective bargaining process. The uncertainty it has created about the lawful bounds of self-help transcend the dispute between the Maine Central Railroad and the Brotherhood of Maintenance of Way Employes. It can change the dynamics of collective bargaining in the railroad industry.

Prior to the *Burlington Northern* and related decisions,[5] a rail carrier engaged in a major dispute with a labor organization representing its employees understood the implications of exhausting the collective bargaining process without reaching an agreement. The employees in the affected craft or class could strike and set up picket lines. Other carrier employees might honor the picket-line and refuse to report for work. The employees of other employers having business at the picketed facility might also refuse to cross the picket-line. For the most part, the bounds of lawful self-help were coterminous with the rail facilities of the primary employer.[6]

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[4] *See Elgin, J. & E. R. v. Burley*, 325 U.S. at 752-53 (Frankfurter, J., dissenting).

[5] *Burlington N. R.R. v. BMWE*, No. 86-166, slip op. (7th Cir., June 4, 1986); *Richmond, F. & P. R.R. v. BMWE*, No. 86-3544, slip op. (4th Cir., July 12, 1986); *Central Vermont Ry. v. BMWE*, No. 86-5245, slip op. (D.C. Cir., June 27, 1986); *Consolidated Rail Corp. v. BMWE*, No. 86-7283, slip op. (2d Cir., June 5, 1986).

[6] In the Florida East Coast strike in 1966 and in the BRAC-Norfolk and Western strike in 1978, extension of picket-lines to

Now, under the decision of the Court of Appeals, the picketing can be extended to the facilities of other railroads having nothing to do with the major dispute, or to the premises of the carrier's shippers, suppliers, and consignees. The decision of the Court of Appeals effects a fundamental modification in the "arsenal of weapons" available to a labor organization in a major dispute. The capacity of a union in a dispute with a small carrier to threaten the entire national rail system through the use of secondary picketing will necessarily alter the dynamics of bargaining in the hundreds of major disputes that are currently pending throughout the industry.[7] The questions presented in Burlington Northern's Petition are of paramount national importance and should be resolved by this Court.

In addition to presenting a question of compelling importance, the decision of the Court of Appeals for the Seventh Circuit is in conflict with the decisions of the Court of Appeals for the Eighth Circuit in *Ashley, D. &*

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other railroads occurred either because the railroads shared common facilities or because the "secondary" railroads were rendering special strike-related assistance to the primary carrier. *See Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R.*, 383 F.2d at 225; *Alton S. Ry. v. Brotherhood of Ry. and Airline Clerks*, 481 F. Supp. 130 (D.D.C. 1978).

[7] The RLA is applicable to airlines as well as railroads. The Court of Appeals' opinion necessarily enhances the prospect of secondary picketing in major disputes in both industries. The prospect for such picketing, and the disruptive effect of even its threat, was illustrated by the recent statement of the International Association of Machinists ("IAM") to the U.S. Department of Transportation in the Texas Air-Eastern Acquisition Case, Docket No. 43825. The IAM argued that labor protective conditions should be imposed as a condition to the merger in order to prevent a nationwide disruption to air service that could result from a labor dispute incident to the merger. Because of the *Burlington Northern* and related court decisions, "the possibility of a nationwide disruption of the air transportation as a result of this merger is therefore greatly increased." *Id.* at 14.

N. Ry. v. United Transportation Union, 625 F.2d 1357 (8th Cir. 1980), and United States Court of Appeals for the Fifth Circuit in *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir.), *aff'd by equally divided court*, 385 U.S. 20 (1966). In both cases the courts held that there were limits to the right to picket incident to self-help in a major dispute and that the limits were enforceable by a court injunction.

The Court of Appeals below interpreted the Railway Labor Act to permit unrestrained self-help once the collective bargaining procedures are unsuccessfully exhausted. This has never been the view of this Court and it is at odds with the policies of the RLA. When the Court restricted the carrier's self-help in *Brotherhood of Railway Clerks v. Florida East Coast Ry.*, 384 U.S. 238 (1966), it "honored" the "spirit of the Railway Labor Act" by prohibiting the carrier from using a strike as an occasion to make sweeping changes in the work rules of its employees. *Id.* at 247. The Court held that a strike does not destroy the community of the striking employees and the carrier, "as the strike represents only an interruption in the continuity of the relations." *Id.* at 246-47 (footnote omitted). The appropriateness of specific forms of self-help have to be evaluated against this transcending relationship. *Id.* at 247. The Court of Appeals below erred when it failed to take account of the impact of unlimited *union* self-help on the ongoing relationship of the parties to the major dispute, as well as on the labor relationships of other neutral carriers who become the targets of secondary boycotts and picketing.

The *Petition for a Writ of Certiorari* analyzes the Court of Appeals' misapplication of this Court's decision in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969). *Amicus Curiae* agrees with that analysis and would emphasize that the court below misunderstood the design of the Railway Labor Act and, in particular, the relationship between

collective bargaining and self-help. "Economic warfare" under the Act is not Armageddon. It is only a means of securing agreement on one or more discrete issues in the overall employer-employee relationship. The Court of Appeals' decision, if allowed to stand, will disrupt labor relations in the railroad and airline industries by permitting a work stoppage on one carrier to infect the labor relations of employers and employees unrelated to the primary dispute.

CONCLUSION

For the foregoing reasons, *amicus curiae* National Railway Labor Conference urges that the instant petition be *granted*.

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ATTACHMENT No. 1

Federal Register Vol. 51, No. 97

Tuesday, May 20, 1986

PRESIDENTIAL DOCUMENTS

Title 3—

Executive Order 12557 of May 16, 1986

The President

Establishing an Emergency Board To Investigate Disputes Between the Maine Central Railroad Company/ Portland Terminal Company and Certain of Their Employees Represented by the Brotherhood of Maintenance of Way Employees

Disputes exist between the Maine Central Railroad Company/Portland Terminal Company and certain of their employees represented by the Brotherhood of Maintenance of Way Employees.

These disputes have not heretofore been adjusted under the provisions of the Railway Labor Act, as amended [the "Act"].

These disputes, in the judgment of the National Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive a section of the country of essential transportation services.

NOW, THEREFORE, by the authority vested in me by Section 10 of the Act (45 U.S.C. § 160), it is hereby ordered as follows:

Section 1. *Establishment of Board.* There is hereby established, effective May 16, 1986, a board of three members to be appointed by the President to investigate these disputes. No member shall be pecuniarily or otherwise interested in any organization of railroad employees or

any carrier. The board shall perform its functions subject to the availability of funds.

Sec. 2. *Report.* The board shall report its findings to the President with respect to these disputes within 30 days from the date of its creation.

Sec. 3. *Maintaining Conditions.* As provided by Section 10 of the Act, from the date of the creation of the board and for 30 days after the board has made its report to the President, no change, except by agreement of the parties, shall be made by the carriers or the employees in the conditions out of which these disputes arose.

Sec. 4. *Expiration.* The board shall terminate upon the submission of the report provided for in Section 2 of this Order.

THE WHITE HOUSE,
May 16, 1986.

/s/ Ronald Reagan

Editorial note: For the White House announcement of May 16 on the establishment of the emergency board, see the *Weekly Compilation of Presidential Documents* (vol. 22, no. 20).

No. 86-39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY, *et al.*,
Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE AS AMICUS CURIAE

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August, 1986

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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IN THE

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OCTOBER TERM, 1986

No. 86-39

BURLINGTON NORTHERN RAILROAD COMPANY, *et al.*,
Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE AS AMICUS CURIAE

The National Industrial Transportation League as *amicus curiae* submits this brief in support of the petitioners, Burlington Northern Railroad Company, *et al.* The League urges this Court to grant the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in *Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employees*, No. 86-1666 (June 4, 1986). Consent to the filing of this Brief has been received from counsel for both the petitioner and the respondent. Letters granting consent have been filed with the Clerk of the Court.

STATEMENT OF THE INTEREST OF THE AMICUS CURIAE

The National Industrial Transportation League is an incorporated trade association whose membership includes approximately 1400 members, who are shippers and receivers of freight and users of railroad transportation services located throughout the United States. Such shippers and receivers of freight transported by railroad carriers are heavily dependent on the uninterrupted availability of railroad transportation service in interstate and foreign commerce.

The issues in this case involve the application of the sometimes conflicting policies underlying the Railway Labor Act and the Norris-LaGuardia Act to situations where employees involved in a major labor dispute with their employing railroad engage in secondary picketing of other railroads which may provide connecting services to the railroad engaged in the primary labor dispute. Such secondary picketing can take place on very short notice and can have very disruptive effects on all of the transportation services being provided by the railroad carriers not engaged or involved in the primary labor dispute.

The Court below held that the Norris-LaGuardia Act did not permit a federal court to enter an injunction against such secondary picketing, even where procedures established by the Railway Labor Act for the resolution of labor disputes in the railroad industry had not been followed between the employees engaged in the secondary picketing, and the railroads subject to such picketing. However, other United States Courts of Appeals have held that an injunction may be available to prevent such secondary picketing in such circumstances. The League and its members

believe it is essential for this Court to grant the petition for a writ of certiorari in order to resolve this important question of federal labor law.

ARGUMENT

This Court should grant the petition for a writ of certiorari in order to resolve an important question of federal labor law. The question closely divided several United States Courts of Appeals. The question to be resolved is whether the Norris-LaGuardia Act, 29 U.S.C. §§101-115, prevents Federal courts from enjoining employees of a railroad engaged in a major labor dispute with one railroad from engaging in picketing of other railroads not involved in the dispute which may provide connecting services to the railroad which is involved in the labor dispute. The explicit terms of the Railway Labor Act, 45 U.S.C. §§151-163, neither bar nor prohibit such "secondary" picketing, but, "in order to avoid any interruption of commerce," it does establish elaborate procedures which must be followed before employees may resort to self-help measures such as picketing to resolve a major dispute with a railroad employer. 45 U.S.C. §152, §§155-160, and *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-380 (1969).

The various Courts of Appeals have been unable to agree on a consistent view of how the Railway Labor Act should be interpreted so as to determine when, if at all, railroad employees must exhaust the dispute resolution procedures of the Act with respect to other employers in the railroad industry (who may have some direct or indirect connection with the primary employer), before they may engage in self-help meas-

ures against such employers. The courts below have also been unable to resolve consistently the related issue of whether the Norris-LaGuardia Act prevents federal courts from enjoining such secondary picketing.

This Court has established the principle that the Norris-LaGuardia Act does not deprive federal courts of jurisdiction to enter injunctions to ensure compliance with the various mandates of the Railway Labor Act. *Chicago & N.W. Ry. Co. v. United Transportation Union*, 402 U.S. 570, 581-82 (1971) and cases there cited. But this Court has not clearly ruled on the question of whether the legislative policies embodied in the Railway Labor Act permit or prohibit secondary picketing, so as to enable the lower federal courts to enjoin such secondary picketing notwithstanding the provisions of the Norris-LaGuardia Act.

This is perhaps not surprising, because Congress has not specified in the Railway Labor Act what measures, if any, each side may or may not resort to when all of the elements in the detailed statutory framework for labor dispute resolution in the railroad industry have been tried and failed. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., supra*, 394 U.S. at 377-380. In particular, Congress has neither prohibited nor authorized such secondary picketing in the Railway Labor Act. This fundamental dichotomy in the policies of the Railway Labor Act is placed in sharp focus by this case. On the one hand, the primary employees are seeking to exercise, after the dispute resolution procedures have been exhausted, one of the many techniques of economic self-help the Railway Labor Act at least implicitly allows, in order to apply indirect economic pressure through

other railroads on the primary employer in order to force resolution of the dispute. On the other hand, by picketing the secondary employer railroads, the primary employees are engaging in or causing a labor dispute with those employers, without following the same dispute resolution procedures of the Act already exhausted with the primary employer. This is inconsistent with the statutory objective of avoiding "any interruption to commerce," an objective of considerable importance to shippers such as members of the League.

Confronted before with the issue of secondary picketing under the Railway Labor Act, this Court, in view of the conflicting policies in the Act, contented itself with holding that the state courts could not become involved in determining the scope of lawful secondary activity. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal, supra*, 394 U.S. at 392-393.[1] Some of the lower federal courts (including the court below in this case) have inferred that the Railway Labor Act allows any and all secondary activity without requiring exhaustion of the Act's dispute resolutions procedures before the activity may be utilized. See Pet. App. pp. 10a-19a. *See also Richmond, F. & P. R. Co. v. Brotherhood of Maintenance of Way Employees*, No. 86-3544, slip op. (4th Cir. July 11, 1986), *Central Vermont Ry. Inc. v. Brotherhood of Maintenance of Way Employees*, No. 86-5245, slip op. at 7-11 (D.C. Cir. June 27, 1986) and *Consolidated Rail Corp. v. Brotherhood of Maintenance of Way Em-*

[1] The issue was also presented in *Atlantic Coast Line Railroad Co. v. Brotherhood of Railway Trainmen*, 385 U.S. 20 (1966), but an equally divided Court was unable to resolve it. *Cf. Trans World Airlines v. Hardison*, 432 U.S. 63, 73 n. 8 (1977).

ployees, 792 F.2d 303 (2nd Cir. 1986). However, other Courts of Appeals have accepted the notion that in certain circumstances the federal courts may determine what is allowable secondary activity under the Railway Labor Act. *Ashley, D. & N. Ry. Co. v. United Transportation Union*, 625 F.2d 1357, 1367-1369 (8th Cir. 1980); *In Re Brotherhood of Railway, Airline and Steamship Clerks*, 605 F.2d 1073, 1075 (8th Cir. 1979) and *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R. Co.*, 362 F.2d 649, 655 (5th Cir. 1966).[2]

The question of whether and to what extent secondary activity may be engaged in by railroad employees after the primary dispute resolution procedures have been utilized is an important one this Court needs to resolve. The uncertainty among the lower courts on the questions has lessened the effectiveness of the Railway Labor Act in avoiding "any interruption to commerce." The petition for a writ certiorari should be granted to resolve this question.

This Court also needs to resolve the closely related question of whether secondary picketing by railroad employees may be enjoined by federal courts under the Norris-LaGuardia Act. The issue revolves around determining whether such secondary picketing is activity "involving or growing out of any labor dispute." Sections 1, 4 and 13 of the Act, 29 U.S.C. §101, §104 and §113. This Court has given a broad interpretation to the statutory definitions of a labor dispute. *Jacksonville Bulk Terminals v. Int'l Longshoreman's Ass'n*,

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[2] Affirmed by an equally divided Court, 385 U.S. 20 (1966). The Fifth Circuit's position would also be controlling precedent in the Eleventh Circuit. *Florida v. Royer*, 460 U.S. 491, 505 n. 10 (1983).

457 U.S. 702, 711-714 (1982). But the Court has also said:

> We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable.

Brotherhood of Railroad Trainmen v. Chicago R. & I. R. Co., 353 U.S. 30, 40 (1957).

The lower federal courts, lacking any definitive guidance from this Court on whether injunctions against secondary picketing in the railroad industry were prohibited by the Norris-LaGuardia Act,[3] have arrived at divergent views of the matter. In the case previously before this Court, the Court of Appeals for the Fifth Circuit had held that a test based on a determination of the employees' economic self-interest should be applied in interpreting the statutory terms involved. *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R. Co., supra*, 362 F.2d at 653-655. This test has also been explicitly adopted by the Eighth Circuit in *Ashley D. & N. Ry. Co. v. United Transportation Union, supra*, 625 F.2d at 1362-64. The court below in this case, on the other hand, expressly rejected this test, and held that the literal terms of the Norris-LaGuardia Act removed federal court jurisdiction to enjoin such secondary picketing. Pet. App. pp. 19a-23a. *See also Richmond F. & P.*

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[3] *Supra* note 1.

R. Co. v. Brotherhood of Maintenance of Way Employees, *supra*, slip op. Part III; *Central Vermont Ry. Co. v. BMWE*, *supra*, slip op. at 3-7; and *Consolidated Rail Corp. v. BMWE*, *supra*, 792 F.2d at 305.

These divergent views on the scope of the Norris-LaGuardia Act have resulted in prolonged labor disputes in the railroad industry, and have caused unsettled labor conditions to the detriment of the free flow of commerce. The parties to present and future labor disputes need to have a uniform nationwide understanding of the role, if any, of injunction suits in regulating secondary picketing in the railroad industry. If that role is clear, then the parties to labor disputes will be able to formulate their strategies so as to allow the interplay of economic forces to provide the impetus for prompt resolution of such disputes. Such prompt resolution of railroad labor disputes would plainly be of substantial benefit to all users of the transportation services provided by the railroads and their employees.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August, 1986

No. 86-39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, BALTIMORE AND OHIO CHICAGO TERMINAL COMPANY, CHESAPEAKE AND OHIO RAILWAY COMPANY, and CSX TRANSPORTATION, INC.,

Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

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NOTE: The following decisions have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the United States Court of Appeals for the Seventh Circuit dated June 4, 1986 ..... 1a

Opinion of the United States District Court for the Northern District of Illinois dated April 23, 1986 ..... 24a

CHRONOLOGICAL LIST OF RELEVANT DOCUMENTS

DATE	RECORD NO.*	PROCEEDINGS
4/9/86	1 (2442)	Complaint in No. 86-C-2442 filed by Burlington Northern Railroad Company in Northern District of Illinois
4/9/86	13 (2442)	Minute order entering temporary restraining order
4/10/86	1 (2486)	Complaint in No. 86-C-2486 filed by Union Pacific Railroad Company and Missouri Pacific Railroad Company in Northern District of Illinois
4/10/86	1 (2487)	Complaint in No. 86-C-2487 filed by The Atchison, Topeka and Santa Fe Railway Company in Northern District of Illinois
4/10/86	1 (2488)	Complaint in No. 86-C-2488 filed by Baltimore and Ohio Railroad Co., et al.
4/10/86	8 (2486) 6 (2487) 8 (2488)	Minute order granting motions for temporary restraining orders
4/11/86	10 (2486) 9 (2487) 13 (2488)	Minute order denying oral motion of defendants to reconsider and denying without prejudice oral motion to transfer case to US District Court for the District of Columbia
4/11/86	11 (2486) 10 (2487) 11 (2488)	Order entering temporary restraining order

* Because the district court proceedings were initiated by four separate complaints (Docket Nos. 86-C-2442, 86-C-2486, 86-C-2487 and 86-C-2488), the record number will indicate in which docket or dockets each entry was made.

DATE	RECORD NO.*	PROCEEDINGS
4/15/86	12 (2486) 16 (2487) 14 (2488)	Case Nos. 86-C-2486, 86-C-2487 and 86-C-2488 all reassigned to Judge Holderman before whom Case No. 86-C-2442 is pending
4/21/86	14 (2486) 18 (2487) 17 (2488)	Defendants file Motion to Transfer cases to US District Court for the District of Columbia
4/21/86	23 (2442) 16 (2486) 20 (2487) 19 (2488)	Preliminary injunction hearing held
4/23/86	19 (2486) 26 (2487) 26 (2488)	Minute order denying motion to transfer
4/23/86	29 (2442) 22 (2486) 24 (2487) 23 (2488)	Memorandum opinion and order granting plaintiff's motion for preliminary injunction
4/24/86		Emergency Notice of Appeal filed by BMWE, et al. in Seventh Circuit
5/30/86		Oral Argument before Seventh Circuit
6/4/86		Opinion of Seventh Circuit reversing judgment of District Court for the Northern District of Illinois
7/15/86		Petition for Certiorari filed
10/6/86		Certiorari granted

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

---

86 C 2442 and related cases, 86 C 2486,
86 C 2487 and 86 C 2488

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff,

v.

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES, *et al.*,
Defendants.

Chicago, Illinois
10:50 a.m.
April 21, 1986

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES F. HOLDERMAN

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* * * *

[59] MR. WHITEHEAD: These are numbers to give your Honor an idea of the magnitude of the interchange of cars between the C&O and B&O and D&H.

In 1985 there were 25,595 cars interchanged out of a total C&O/B&O system number of 2,457,246, or approximately 1%.

The 1985 revenue associated with the interconnections with the D&H totalled $14,966,425 out of a C&O/B&O total of $2,056,870,662, approximately seven-tenths [60] of 1%.

* * * *

RICHARD FLIESS,
CHESSIE SYSTEMS WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. WHITEHEAD:

Q. Mr. Fliess, if you would, please state and spell your full name for the record.

A. Okay. My name is Richard Fliess, and the last name is spelled F-l-i-e-s-s.

Q. By whom are you employed?

A. I'm employed by the Chessie System Railroads.

Q. And how long have you worked for the Chessie System?

A. 23 years.

Q. What is your current position, Mr. Fliess?

A. I am currently General Manager, Operations, Chessie System Railroads.

Q. How long have you held that position?

A. Approximately one year.

[61] Q. And what was your immediately preceding position?

A. Prior to that I was General Manager of Transportation Planning for approximately two years.

Q. In general, what are your duties and responsibilities in your current position?

A. Primary duties and responsibilities are the day-to-day responsibility for all train operations on Chessie

System, as well as responsibility for our entire locomotive fleet.

Q. Now, when you say Chessie System, Mr. Fliess, what railroads are you referring to?

A. Chessie System Railroads are made up of the C&O Railroad, the B&O Railroad, and the B&OCT, that is, the Baltimore and Ohio Chicago Terminal.

Q. Are you familiar in your current position with the operations of these three railroads?

A. Yes, I am.

Q. Are you familiar with the lines over which these three railroads operate and the points at which they interchange traffic with other railroads?

A. Yes, I am.

Q. Approximately at how many different locations do the Chessie System Railroads interchange traffic with other rail carriers?

A. We have approximately 500 interchange locations.

Q. And with approximately how many separate railroads does [62] the Chessie System interchange traffic?

A. About 100 different carriers.

Q. Are you familiar with the operations or the lines operated by a railroad known as the Maine Central Railroad, Mr. Fliess?

A. I know very little about the Maine Central.

Q. Do you know where its operations are or over what lines it operates?

A. I know generally where it's located.

Q. Do any of the Chessie System railroads that you have just identified have any interchange—direct interchange—of traffic with the Maine Central?

A. We have no direct relationship with the Maine Central.

Q. Do any of these Chessie System roads have any direct interchange with a railroad known as the Portland Terminal Company?

A. We do not.

Q. Do the Chessie Systems railroads that you have testified concerning have any operations in the states of Maine, New Hampshire or Vermont?

A. No, we do not.

Q. Do any of these Chessie System railroads interchange any traffic with a railroad known as the Boston & Maine Railroad?

A. We do not.

[63] Q. Do any of these Chessie System railroads interchange traffic with a railroad known as the Delaware & Hudson Railway Company?

A. Yes, we do interchange with the Delaware & Hudson.

Q. Of the approximately 500 total Chessie interchange points, how many of them are with the Delaware & Hudson?

A. We have two direct interchanges with the Delaware & Hudson.

Q. And where are those two interchanges located?

A. One of the interchanges is located in Buffalo, New York. The other interchange is located in Philadelphia.

Q. And are there any interchanges at which you indirectly interchange traffic with the Delaware & Hudson?

A. The only indirect interchange is the RF&P or Pot Yard operation at Alexandria, Virginia, where the Pot Yard services the switching carrier between roads.

Q. The RF&P, is that the Richmond, Fredericksberg & Potomac?

A. That's correct.

Q. And you made reference to the "Pot Yard". Is that also known as the Potomac Yard in Alexandria, Virginia?

A. That is correct.

Q. Are there any other connections between the Chessie System railroads and the D&H other than at Buffalo, Philadelphia, and indirectly at the Potomac Yard?

[64] A. No, there are not.

Q. When did the Chessie System railroads begin interchanging traffic with the Delaware & Hudson at Buffalo, New York ?

A. Many, many years ago. I do not know.

Q. Was that something that has started since the picketing that has occurred at the Delaware & Hudson during the month of March, 1986?

A. No.

* * * *

[68] Q. Now, you testified earlier about the fact that there was an indirect interchange at the Potomac Yard involving the B&O and C&O and the Delaware & Hudson. What do you mean when you say "indirect interchange"?

A. At Potomac Yard at Alexandria there are six roads, six railroads, that operate into Potomac Yard. Those roads are the Baltimore and Ohio, the Chesapeake and Ohio, the Southern, the Richmond, Fredericksberg & Potomac, Conrail and the Delaware & Hudson, and those six roads all operate into Potomac Yard. Potomac Yard handles the inbound trains and dispatches them out to each of the other different carriers depending on the route of the traffic.

Q. Is there any direct interchange or direct connection between either the B&O or C&O with the Delaware & Hudson at the Potomac Yard?

A. No, there's no direct interchange.

Q. As a result of the exchange of traffic at the Potomac Yard, do B&O or C&O employees go onto the property of the Delaware & Hudson?

A. No, they do not.

Q. And do Delaware & Hudson employees, as part of the interchange of traffic, go onto the property of the B&O and C&O at the Pot Yard?

[69] A. No, they do not.

Q. How long has this indirect interchange relationship at the Potomac Yard with the Delaware & Hudson existed?

A. It's been in existence, as well, for many, many years.

Q. Is this something that has just been created since the picketing of the D&H commenced in March of 1986?

A. No, it has not.

Q. Now, I read into the record a few minutes ago, Mr. Fliess, some statistics involving the number of cars that are interchanged on an annual basis between the Chessie System railroads and the Delaware & Hudson.

Approximately how significant, in comparison with the total number of cars that the Chessie System roads interchange with other carriers, is the interchange with the Delaware & Hudson?

A. Our interchange traffic with the Delaware & Hudson is about 1% of the total on the Chessie System railroads.

Q. Mr. Fliess, have there been any instances in which the Chessie System roads have provided locomotives or motive power directly to the Maine Central or the Portland Terminal Railway Company since the Brotherhood commenced its strike against these carriers?

A. We have not provided directly to these carriers any locomotive power.

Q. Have the Chessie System roads provided any locomotives [70] to the Boston & Maine?

A. We have not provided any power—locomotive power—to the Boston & Maine.

Q. Have the Chessie System railroads provided locomotives to the Delaware & Hudson?

A. Yes, we have.

Q. Under what circumstances, generally, have these locomotives been provided?

A. The most general situation is an existing run-through agreement whereby Chessie System power—locomotives—operates through Buffalo to the Delaware & Hudson on to destinations on that particular road.

Q. Now, you mentioned a run-through arrangement. Would you please explain for the record what a run-through arrangement is?

A. A run-through arrangement with another carrier is—concerning locomotives—is where one carrier's locomotives remain on the train and will continue on through to the other carrier.

Q. And at what locations on your system is there a run-through arrangement with the Delaware & Hudson?

A. We have such a run-through agreement in place at Buffalo, New York.

Q. Why would railroads enter into a run-through arrangement? What is the reason for that?

[71] A. The primary reason that you would enter into a run-through agreement is to expedite train traffic, and quite frequently the shippers, themselves, are the people that provide the incentive or really push the railroads to operate through power to expedite the train service.

Q. Is there a particular shipper whose movements have been the subject of the run-through arrangements between the B&O and the Delaware & Hudson?

A. Yes, there has.

Q. And what is that shipper?

A. The original agreement was for grain movement, but it had been inactive until about mid-'85, and a shipper—traffic developed on our line that terminated off our line. It involved the Delaware & Hudson. That particular shipper was Sealand.

Q. And what kinds of commodities or freight do you carry for Sealand?

A. Well, it's all container and trailer traffic. I'm not familiar with the various contents of these trailers or containers.

Q. And does this arrangement—in what direction does this freight move across your line?

A. This traffic moves on our line both east and west.

Q. In order to explain how this run-through arrangement works, let's take as an example a Sealand shipment that [72] commences—where?—in Chicago, Illinois? Is that where you pick them up?

A. That's correct.

Q. What will happen, using this run-through arrangement, when that shipment of cars arrives at Buffalo, New York?

A. When we—as an example, I received a Sealand train from the Burlington Northern. Our power leaves Chicago, operates across the Chessie System, and when we arrive at Buffalo, we turn the train in its entirety, locomotives and the entire train, over to the Delaware & Hudson to continue operating to destination.

Q. What employees or which carrier's employees will operate that power across the Delaware & Hudson system?

A. The employees of the Delaware & Hudson.

Q. Do any Chessie System employees provide services in connection with that run-through arrangement on the Delaware & Hudson property?

A. No.

Q. What would happen if, in fact, you did not have a run-through arrangement with respect to that train coming from Chicago? What would happen in Buffalo if there were no run-through agreement?

A. We would have to cut the locomotives off, and at some point in time the Delaware & Hudson then would have to attach their locomotives to the train.

[73] Q. Over what period of time would it be—what period of time would elapse as a result of cutting off your locomotives and the Delaware & Hudson hooking up with theirs?

A. Well, it could range anywhere from an hour to a much longer period of time depending on the availability of their power and depending on the activity associated with the train's continuing operation.

Q. What was the reason for the Chessie System agreeing to a run-through arrangement with the D&H with respect to these Sealand trains?

A. Well, it was because Sealand was very interested in the trains being handled very expeditiously, and we

entered into these agreements to meet a customer need, really.

Q. Now, is the run-through arrangement that the Chessie System has with the D&H in Buffalo the only such run-through arrangement that the Chessie System has on its entire system?

A. No, we have others.

Q. Could you give us some examples of other locations at which the Chessie System has run-through arrangements with surrounding carriers?

A. We have a run-through arrangement with Southern Pacific from East St. Louis to Cincinnati, Ohio, we have several run-through agreements with Conrail, we have a run-through agreement between Toledo, Ohio and West Olive, Michigan, [74] we have another run-through agreement with Conrail in the state of Michigan that runs from Jackson, Michigan to Flint, Michigan, we have another run-through agreement with Conrail that operates between Hagerstown, Maryland and Harrisburg, Pennsylvania, we also have a run-through agreement with the Richmond, Fredericksberg & Potomac Railroad that operates—the power operates between the Potomac Yard and Philadelphia. We also have one other location where we have run-through power with Conrail from Philadelphia to Baltimore.

Q. Do carriers ever exchange locomotive power on a less formal or more informal basis?

A. Yes, we do.

Q. Under what circumstances?

A. From time to time, as some need arises, whether it's an emergency or whether it's a power dislocation for one carrier, we do use power on an informal basis for other carriers.

* * * *

[76] Q. Mr. Fliess, over what portions of the Delaware & Hudson line were the Chessie System locomotives covered by this run-through agreement to travel?

A. They were to travel over the Delaware & Hudson from Buffalo to Binghamton and to the Albany area.

Q. And why was the run-through to—why were some of the run-throughs to go to the Binghamton location?

A. Well, some of the Sealand traffic at Binghamton went off on to another carrier, the New York, Susquehanna & [77] Western, and other portions—other trains of Sealand operated on through to Albany, and ultimately to Boston.

Q. The traffic that went through Binghamton, do you know what the ultimate destination of that traffic was?

A. Little Ferry, New Jersey.

Q. Now, Mr. Fliess, was the Delaware & Hudson given permission by the Chesapeake and Ohio or the Baltimore and Ohio to use Chessie System locomotives over any other portion of its property?

A. Would you restate that, please?

Q. I apologize. Has the Chessie System given the Delaware & Hudson permission to use Chessie System locomotives over any portion of its property other than the run to Albany and the run to Binghamton?

A. Yes, on one other occasion.

Q. And was that a run-through from Buffalo?

A. No, it was not.

Q. What was the point of origin of that power?

A. There was one other case where power originated for a train, a Delaware & Hudson train, at Philadelphia.

Q. I'll be asking you about that in just a couple of minutes, but in connection with the run-through agreement that we have marked as Exhibit 3, has D&H been given authority by the Chessie System to use Chessie System locomotives on any portion of the D&H property other than the line to [78] Albany and the line to Binghamton?

A. No, they have not.

Q. Has the D&H ever been given permission by the Chessie System to use any of these Chessie System loco-

motives under this run-though arrangement on any other railroad?

A. No, they have not.

Q. Has the Chessie System given permission for its locomotives to be used on the Boston & Maine?

A. No, we have not.

Q. The Maine Central?

A. No.

Q. The Portland Terminal Company?

A. No.

Q. Now, to your knowledge, Mr. Fliess, have Chessie System locomotives ever been used on the Boston & Maine?

A. I have no such knowledge.

Q. Do you have any knowledge that they have ever been used on the Maine Central?

A. I do not.

Q. Or on the Portland Terminal?

A. No.

Q. Now, I believe you testified a few minutes ago that the Sealand train run-throughs occurred with the frequency of approximately one to two a week, is that correct?

A. That's correct.

[79] Q. Are you aware of the fact that in March of this year picketing commenced at the Delaware & Hudson by members of the Brotherhood?

A. Yes.

Q. Did the frequency of the Chessie System's provision of locomotives under this run-through arrangement change as a result of the commencement of the picketing on the Delaware & Hudson?

A. No, they did not.

Q. Am I correct, then, in understanding that they continued to be provided at least initially on a one to two run per week basis?

A. That is correct.

Q. Mr. Fliess, are there any Chessie System locomotives currently operating on the Delaware & Hudson?

A. No, currently none of our locomotives are on the Delaware & Hudson.

Q. When was the last time at which the Chessie System provided locomotives under this run-through arrangement to the Delaware & Hudson?

A. I believe it was on April 6th.

Q. And have those locomotives been returned to the Chessie System?

A. Yes, they have.

Q. Do you recall when they were returned to the Chessie [80] System?

A. They were returned to us approximately the 12th of April.

Q. Has the Chessie System had any communications with the Delaware & Hudson since the last unit was provided on April 6th with respect to the Chessie System's plans to provide any additional locomotive power under this run-through arrangement?

A. Yes, there's been communications.

Q. What information has the—what has the Delaware & Hudson been told with respect to the intent of the Chessie System?

A. We have told them since early April that we did not have power available to operate through on the Delaware & Hudson.

Q. And are there currently any plans on the Chessie System to provide in the future locomotives to the Delaware & Hudson pursuant to this run-through arrangement?

A. There are no plans currently, no.

Q. Why not?

A. Two primary reasons. Number one, we had a significant uptick in our own business levels, and we had a need to keep the locomotives on our property, and, secondly, the locomotives that went through in early April to the Delaware & Hudson were not returned to

us with the promptness that [81] they had normally been returned since this agreement had been in place.

Q. When did you discover that the Delaware & Hudson was not returning its locomotives to you as promptly as you had anticipated under this agreement?

A. It followed the April 6th date when the locomotives did not return to us in the normal three to three and a half day period.

Q. And what effect, if any, did the delay of the Delaware & Hudson in returning your locomotives to you have on the decision of the Chessie System not to provide additional locomotives in the future under this run-through arrangement?

A. Well, it had a significant bearing on us for the future to not provide them.

Q. Now I would like to draw your attention, Mr. Fliess, to the interchange between the Baltimore and Ohio and the Delaware & Hudson at Philadelphia, Pennsylvania. You recall we looked earlier at the interchange agreement.

What facility does the Baltimore and Ohio have at Philadelphia?

A. At Philadelphia we have a small yard referred to as our East Side Yard. It is a yard that has a capacity of approximately 450 cars.

Q. Does the Baltimore and Ohio operate north of that point on its system?

[82] A. The Baltimore and Ohio terminates at Philadelphia where it connects with Conrail.

Q. Now, since the picketing of the Delaware & Hudson commenced in March of 1986, have there been any occasions, or has there been an occasion where the Baltimore and Ohio has provided the Delaware & Hudson with locomotives at Philadelphia?

A. Yes, one such occasion.

Q. Is that what you mentioned just a few minutes ago?

A. That's correct.

Q. When did this occasion occur?

A. On April the 6th we provided locomotive power.

Q. And how many units did you provide to the Delaware & Hudson at Philadelphia?

A. We provided five locomotives to them.

Q. Why did the Baltimore and Ohio provide the Delaware & Hudson with these five locomotives on April 6th, 1986?

A. Well, the situation had developed into an emergency of our own with this small terminal at Philadelphia that we have. We had accumulated in excess of 100 cars destined to the Delaware & Hudson, and we were in a very congested situation, and we were extremely anxious to see the traffic move for our own benefit, as well as the benefit of the shipper.

Q. What options did the Baltimore and Ohio have, other [83] than providing locomotive power, to the Delaware & Hudson to resolve this emergency?

A. We had several options, and one of them was for the Delaware & Hudson to provide power, which they had informed us they were unable to do, but our other options would have been to consolidate the traffic out of our terminal and store it on our main line there at Philadelphia, which would have caused us quite a bit of problem, or, secondly, we could have consolidated the traffic and moved it back in a southerly direction from where it had come, and stored it at some other location, such as Wilmington, Delaware, which is some distance south of Philadelphia.

Q. Why did you decide not to back-haul this traffic down to Wilmington, Delaware?

A. Because—well, several reasons. The expense involved, and also at a location where we might have suffered pilferage with the commodities.

Q. And what was the reason why you elected at this time not to move the traffic out of your line and to store it—out of your yard and to store it on one of your main lines in Philadelphia?

A. Simply because it would have made us still congested on our main tracks in the Philadelphia area.

Q. How many main lines does the B&O have in that area?

A. We have two main tracks right in that particular area.

[84] Q. You would have used one of them, if I understand it, if you had followed that option?

A. That's correct.

Q. Now, what was Delaware & Hudson supposed to do with the five locomotives that you provided to them on April 6th in order to clear the yard at Philadelphia?

A. The understanding with the Delaware & Hudson was that when we provided the power at Philadelphia to operate the train, that they would operate this train to Allentown and on north to their yard at Binghamton and promptly return the power to us at Buffalo, the same as the power is returned at—off of our Sealand runs.

Q. Was the Delaware & Hudson given permission to use these locomotives in any way other than to deliver these cars from your yard to Binghamton and then to return the power to Buffalo?

A. They were not.

Q. Did the Delaware & Hudson comply with these limitations?

A. They did not.

Q. When did you get back your locomotives?

A. We got three of the five locomotives back on April the 9th, which would have been consistent with our understanding. The other two were not returned to us until April 14th, as I recall.

[85] Q. Now, was there any other equipment provided to the Delaware & Hudson in connection with this emergency move out of the Philadelphia Yard?

A. On the train out of Philadelphia, we did have one of our cabooses on that train.

Q. Why was it necessary to place a Chessie System caboose on the end of this train?

A. When the arrangements were made with the Delaware & Hudson to operate this one particular train, they were to have provided a rear end device in lieu of a cab which would comply with all the company and FRA regulations, and when they arrived at Philadelphia with a crew, they had failed to bring a rear end marking device with them, and our people elected to put a caboose on the train.

Q. Could the train have left B&O's yard in Philadelphia without a caboose or some other form of rear end marking?

A. Well, it couldn't have left without some type of marking or caboose, one or the other.

Q. What was the arrangement or what was the understanding with the D&H as to when they would return this caboose to the Chessie System?

A. Our understanding was that the caboose would be returned through Buffalo immediately with the locomotives.

Q. Was the D&H given any authority or given any permission to utilize the Chessie System caboose in connection with any [86] any other D&H operations?

A. No, they were not.

Q. Did the D&H comply with these restrictions that were placed on its use of this caboose?

A. They did not.

Q. When did you finally get your caboose back?

A. We finally got our caboose back on April 17th.

Q. And what were the circumstances of your regaining possession of your own caboose?

A. We finally regained possession of it because the Delaware & Hudson operated the caboose into Potomac Yard on one of their trains, and we had Potomac Yard people to capture the caboose and give it to us at Potomac Yard.

Q. What effect, if any, has the—did the failure of the D&H to comply with the limitations on the use of your equipment that you placed on it in connection with this emergency move out of Philadelphia have on the decision of the Chessie System not to provide any additional locomotives and equipment to the D&H?

A. Well, it had significant effect, as well as our need for the locomotives.

Q. Has the B&O or the Chessie System provided the D&H with any other locomotives at Philadelphia since that one move on April 6th?

A. No. That's been the only move.

[87] Q. Why not? Why haven't you provided them with additional locomotives out of Philadelphia?

A. Well, our rationale was much the same as it was with the power operating through from Buffalo on the Sealand trains, simply because they had abused the use of it and would not return it to us under the scope of the agreements we made.

Q. Now, you mentioned that—approximately how many cars were taken out of the Philadelphia yard in this one move?

A. About 100 cars had left Philadelphia on that one train.

Q. Under normal circumstances, how many cars are interchanged on a daily basis between B&O and D&H at Philadelphia?

A. Ten cars, maybe.

Q. Has there been any reoccurrence of the congestion emergency at the Philadelphia Yard since the move on the 6th of April?

A. Yes, since the train was operated on the 6th, traffic has continued to accumulate at Philadelphia.

Q. Approximately how many cars destined for the D&H piled up once again at Philadelphia?

A. As of yesterday, we had in excess of 100 to 120 cars.

Q. How has the Chessie System dealt with this congestion problem now in Philadelphia?

A. The first step, we have put together a train of [88] approximately 90 cars, and we have occupied one of our main tracks with the train. The balance of the traffic is in one of our yard tracks at Philadelphia.

Q. I take it that the Chessie System has not provided locomotives once again to the D&H to move this traffic out of the Chessie Philadelphia Yard?

A. No, we have not.

Q. Why has the option not been exercised this time?

A. Back to the problem that we had experienced previously with the abuse of the power, not returning it to us under the scope of the verbal agreement we had.

Q. Now I would like to draw your attention once again to the interchange between the B&O and C&O and the Delaware & Hudson at Buffalo, New York.

You are aware, are you not, that in March of 1986, picketing commenced by the Brotherhood of the Delaware & Hudson?

A. Yes, I am.

Q. Have there been any changes in the way the interchange has worked at the Buffalo interchange point as a result of the picketing that has occurred since early March?

A. Yes, there has been some change.

Q. What is the nature of that change?

A. Effective March the 15th under the terms of this interchange agreement, it became our turn, Chessie's turn, [89] to operate all interchange in Buffalo. That means that we would not only deliver interchange cars from Chessie Road to the Delaware & Hudson, but we would pull any interchange cars coming from the Delaware & Hudson to the Chessie.

We started our year under the terms of the agreement on March 15th. When the strike began, we advised the Delaware & Hudson that our crews would not come into their yard, and they would have to assume delivering

cars to our, Chessie's, yard, as well as pull the interchange back to their own yard.

Q. Am I correct in my understanding, then, that since this picketing has commenced, B&O and C&O employees have not gone onto D&H property to pick up cars and deliver cars for interchange?

A. That is correct.

* * * *

[91] Q. To your knowledge, Mr. Fliess, is the Chessie System providing any form of financial assistance to the Maine Central or the Portland Terminal Company?

A. Not to my knowledge.

Q. Are you providing any financial assistance to the Boston & Maine or the Delaware & Hudson?

A. Not to my knowledge.

Q. Has the Chessie System provided any employees or supervisors to the Maine Central or the Portland Terminal Company as a result of the fact that those carriers are on strike?

A. I have no such knowledge.

Q. Have any such employees or supervisors been provided to the Delaware & Hudson or the Boston & Maine?

A. Not to my knowledge.

Q. What would be the effect on the operations of the Chessie System if the picketing were permitted to resume by the Brotherhood? What would be the effects on your * * *

[92] A. It would be devastating.

Q. In what respect? What would be these effects?

A. Well, first of all would be the economic impact, not only short term but long term, because of our competitive position with other carriers and other modes of transportation. The traffic that you may lose not only short term but long term because here again of the competitive nature of it, has a serious impact on our employees. They would lose their ability to earn a pay-

check, as well as the employees in other critical areas, such as the automotive industry, where we provide just-in-time type service with automotive parts.

Also it has an effect on such critical areas as U.S. mail we handle. It has an effect on perishable traffic that we handle. It has an effect on the passenger system we operate for the Amtrak trains as well as the commuter operations that we handle.

Q. Where do you have commuter operations?

A. On Chessie, we have commuter operations in the Baltimore-Washington area, and also operate from Washington, D.C. as far west as Martinsburg, West Virginia, and we also have commuter operations in the Pittsburgh area.

* * * *

[CROSS EXAMINATION BY MR. CLARKE:]

[101] Q. Let's go, if we can, to page 1 of the agreement, itself, paragraph No. 3, that paragraph which deals with the interchange of cars between B&O's Buffalo Creek Yard and D&H's SK Yard "shall be handled by B&O and D&H delivering and pulling trains." Do you see that paragraph?

A. Yes, I see that.

Q. And it's to be done on an alternating annual basis with D&H commencing the first year of service beginning March 15, 1983?

A. Yes, I see that.

Q. Now, to perform the actual delivering and pulling trains [102] from the respective yards, that's a costly type of service, isn't it?

A. Yes, it is.

Q. And the way this normally operates is you do it for one year, they do it for another year, and then you alternate back and forth so that the cost is equalized over a long period of time, isn't that correct?

A. That's the concept of a push-pull arrangement.

Q. On a push-pull arrangement, does the carrier actually performing the push-pull charge for its crew and engine time?

A. No, they do not.

Q. All right, now, let's go to March 15th of this year. Chessie had just completed theirs last year. They had 1985 up until March 1986, is that correct?

A. That's correct.

Q. Beginning in March of 1986, was there a written agreement modifying this paragraph 3 in Exhibit 1?

A. There was none that I'm aware of.

Q. Was there an arrangement made as to who would pay for the Chessie System continuing to perform this service?

A. There was no special arrangements made that I'm aware of.

Q. Are you saying that there are no arrangements or just that you are not aware of—

[103] A. I am not aware of any arrangements.

Q. Now, let's, if we can, just stop on this for a second and think about it. You have been through strikes on the Chessie System before, haven't you?

A. Yes, I have.

Q. When a strike occurs, the striking organization will place people with a picket sign near entrances and stuff of the company, is that correct?

A. That's correct.

Q. And because those picket signs are there, employees can or cannot, depending on their own will, cross that line and go to work, is that correct?

A. That's correct.

Q. So it's up to the individual employee who honors the picket line to determine whether or not it's in his own interest to cross or not cross that picket line, is that correct?

A. That's correct.

Q. Now, when you have—let's go to Buffalo Creek Yark and the D&H's SK Yard. Those are two yard facilities up in the Buffalo, New York area, is that correct?

A. That's correct.

Q. How far separate are they, how many miles apart?

A. Approximately three miles.

Q. So in order to interchange the cars between the B&O [104] and the D&H, what happens is that the—in 1985, up until March of 1986 and continuing on now—who would actually perform the separation of the cars and the placing of them into blocks?

A. Well, I'm not aware that there was any blocking of traffic. Traffic would—you know, any traffic you had for the D&H, you would deliver it in a single block, and you would pull traffic that was equally as well in a single block back to the Chessie.

Q. All right, now, let's go to March 1st of 1986. If a train came in to the B&O's Buffalo Creek Yard with traffic destined for the D&H, who would actually perform the taking of that traffic out of the train and then getting it over to the SK Yard? How would that happen?

A. Well, it could be two separate functions. The function of taking it out of an inbound train would have maybe have been, in the case of the inbound train to B&O, would have been a B&O yard crew, and the delivery of the interchanged cars would have been by the D&H when they brought cars to Chessie.

Q. So in 1985, from March 15th of '85 until March 15th of '86, the way this agreement was to work was that the D&H would send an engine and people over into the Buffalo Creek Yard to pick up the cars that were destined for the D&H, is that correct?

[105] A. That's correct.

Q. And the same thing would occur, they would bring cars from the D&H over to the Buffalo Creek Yard?

A. That's correct.

Q. So when we talk about push and pull, they would pull, or whatever term you give it, their cars from the D&H lots or yards over to the B&O—is it C&O or B&O?

A. It's the B&O yard there in Buffalo.

Q. So they would take cars from the D&H yard and move them over to the B&O's yard at Buffalo Creek in Buffalo?

A. That's right.

Q. And then they would pick up whatever cars were available for the D&H at that yard and take them back to their yard?

A. That's correct.

Q. And this is what is continuing to today?

A. That is correct now.

Q. All right, now, in a strike situation, if there were picket lines over at the D&H facility—and there were as of March 15th, were there not, of this year?

A. As far as I know, there were. I do not have firsthand knowledge that they were there.

Q. But if there were—let's assume there were picket lines at the D&H facilities—your operating crews, B&O operating crews, would most likely not bring their train across that [106] picket line, is that correct?

A. I would—you know, as you said earlier, they have an option. I would think that they probably would not.

Q. Excuse me, I think I got double negatives in there.

A. I would think that they wouldn't.

Q. You would think that, as a practical matter, your B&O operating crews would not cross the picket line and go into the D&H yard?

A. That's correct.

Q. So in order to get your traffic and to perform your agreement, you would have to put supervisors on your train to bring it across into the D&H yard, is that correct?

A. That's correct.

Q. And that would have caused problems with the operating unions, wouldn't it?

A. I don't know if it would have or not.

Q. In the past, hasn't that caused problems?

A. Normally, it has not caused problems when we used non-contract employees to perform service.

Q. But in order to avoid that problem of having to use supervisors, you continue to perform the work and have the D&H do the push and the pull?

A. The D&H continued to perform the push-pull because they had their officer crews performing the work, that's correct.

[107] Q. And that eliminated the need for you to have your officer crews do the work?

A. That's correct.

* * * *

[109] Q. Now, when you have a run-through, does the NYS&W participate in that run-through, the NYS&W?

A. When you say they participate, do you—

Q. Do they? Do they participate in the run-through?

A. No, they do not—we do not participate with them in a run-through agreement for power.

Q. All right, so what happens, then, if the train goes from Buffalo to Binghamton and then interchanges or is turned over to the NYS&W, at that point the power is taken off, and the NYS&W places it own power on the train?

A. That's correct, to the best of my knowledge.

Q. Now, do you also have a run-through that goes from Buffalo over to Albany?

A. That's correct.

Q. And once it gets to Albany, what happens with the train at that point?

A. It's the same situation. Our run-through power [110] agreement only covers as far as Albany, so the D&H has to make other arrangements with the train from that point.

Q. Well, what type of run-through train do you have going from Buffalo to Albany?

A. From Buffalo to Albany, it's here again Sealand container trains.

Q. So it would go south, then, on the Conrail line down to the Port of New York?

A. I don't know.

Q. Do you know where it goes from Albany? Does it go—

A. Trains as far as we operate them are destined to Boston.

Q. To Boston. So it could then go on to the B&M over to Boston?

A. It could, yes.

Q. At that point would the D&H take off the Chessie power and put its own—the Boston & Maine engines on and take it to Boston?

A. Well, they could put any kind of power on it. Our power is not supposed to go any farther east than Albany.

* * * *

[111] Q. Would the D&H have the right to use one of your run-through locomotives and take a train up to Rouse's Point?

[112] A. No, they would not, not under the scope of the agreement.

* * * *

[115] Q. Let's go, if we can, to the Albany—excuse me—the Philadelphia to Allentown movement. You indicated that there were about 100 cars stacked up in the B&O yard in Philadelphia, is that correct?

A. That's correct.

Q. And around April 6th, the Chessie System provided about [116] five engines for the movement of those cars?

A. That's correct.

* * * *

Q. Do you know who made the arrangement to allow the five engines to be used?

A. Yes, I do.

Q. Who made that decision?

A. I made that decision.

Q Who asked you about that?

A. The operating center for the D&H made the request.

Q. They asked you for the equipment?

A. They asked us if we could furnish locomotives to move the train, because they were unable to do so. But we initially had told them we had an emergency situation and we had to make some kind of arrangement to move the cars. And the conversation was they had no locomotive power and if we could furnish the power they would make arrangements to move the train.

Q. Was that the first time this occurred since March 3rd, 1986?

A. The first time what occurred?

Q. That you said you had an emergency situation in the Philadelphia Yard and you needed to have the cars moved out.

[117] A. Yes, it's the first time, as far as I'm aware.

* * * *

[123] Q. You indicated that the effect of picketing on your [124] system would be a severe economic impact upon the Chessie, is that correct?

A. That's correct.

Q. Now, that economic impact upon the Chessie will occur only if your own employees honor the picket lines, isn't that correct?

A. If employees didn't honor the picket line, we wouldn't have a strike, I wouldn't think.

Q. It's up to the employee to honor the picket line or not honor the picket line, isn't it?

A. It's their prerogative, as far as I know.

* * * *

[REDIRECT EXAMINATION BY MR. WHITEHEAD:]

Q. With respect to the interchange at Buffalo between the Chessie System and the D&H, at the present time, Mr. Fliess, is the Chessie System providing any interchange services for the D&H at Buffalo?

[125] A. No, we are not.

Q. Now, with respect to the Sealand train that you have testified heads eastbound, does that train originate on the Chessie property?

A. No, it doesn't originate on Chessie.

Q. Where does it come from?

A. It comes to us from several carriers but primarily from the BN at Chicago.

Q. Do you know where the BN picks that up, where that traffic originates?

A. Not, you know, definitely. I don't definitely know.

Q. Is it on the west coast?

A. It comes from the west coast and it originates different locations but it is west coast traffic.

Q. Am I correct that it originates on the west coast, the BN carries it to you in Chicago, you carry it to the D&H in Buffalo, the D&H carries it on, and it ultimately ends up either in Little Ferry, New Jersey or Boston, Massachusetts, is that correct?

A. That's correct.

Q. Has that movement changed at all since it became —since its inception in the summer of 1985? Has your handling of that movement changed?

A. No, it hasn't.

Q. Are you providing any locomotives at the present time [126] to the Delaware & Hudson pursuant to the run-through arrangement through Buffalo?

A. We have not been providing locomotive power to run-through trains.

Q. And you have not been providing it since when?

A. April the 6th was the last run-through train that Chessie power went through on.

Q. And other than the one instance in which you provided power in connection with your Philadelphia emergency, have there been any other provisions of locomotives to the Delaware & Hudson by the Chessie System?

A. No, there hasn't.

Q. To your knowledge, have any Chessie locomotives been utilized by either the Maine Central or the Portland Terminal since the inception of the Brotherhood's strike or picketing?

A. Not to my knowledge.

* * * *

[RECROSS-EXAMINATION BY MR. CLARKE:]

Q. You indicated that since April 6th, am I correct, that you are not providing any more run-through trains to the D&H?

A. No, I did not. Trains have continued, but we have not [127] run power, our locomotives, on these trains.

Q. So, in other words, the power is taken off at Buffalo?

A. That's correct.

Q. You have an agreement with them to provide power, do you not?

A. We have an agreement that we can provide it.

Q. Have they taken a position with you that you must continue to provide that power?

A. No, they have not.

Q. So that's within your discretion to provide the power or not?

A. It is a discretionary thing.

* * * *

HOWARD EMERICK, CHESSIE SYSTEMS WITNESS, SWORN

[DIRECT EXAMINATION BY MR. WHITEHEAD:]

[128] Q. Would you please state and spell your full name for the record?

A. Howard Emerick, E-m-e-r-i-c-k.

Q. I wonder if it might be easier if you would move the diagram aside so the court reporter can get a clear shot.

A. All right.

Q. Mr. Emerick, by whom are you employed?

A. Chessie System Railway.

Q. And how long have you worked for the Chessie System?

A. About 15 years.

Q. What is your current position?

A. Director of Labor Relations.

Q. And how long have you had that position?

A. About five months.

Q. And what were your prior positions with the Chessie System?

[129] A. Senior manager, labor relations, and prior to that Assistant Director.

Q. Have you had any duties or any positions with the Chessie System that were not involved with labor relations?

A. Not in the last five years—eight years—I'm sorry. Prior to that, I worked as a conductor and trainman on the Western Maryland, which is now part of the B&O.

Q. Is that part of what is euphemistically referred to as Train and Engine Service?

A. That's correct.

Q. You were actually out riding trains, in other words?

A. That's correct.

Q. Now, would you briefly describe for us your duties and responsibilities in your present position?

A. Briefly, as a director, I'm in charge of the planning and negotiating long term and short term agreements with the unions and interpreting same.

Q. I'd like to direct your attention, Mr. Emerick, to the period since the Brotherhood strike commenced in early March against the Maine Central and the Portland Terminal Company. Since that time have you had any conversation with any representatives of Guilford Transportation Industries the parent corporation of the Maine Central and the Portland Terminal?

A. I had a call on a Saturday—I believe it was April 5th— [130] from a man who said that he was Sidney Culliford—I believe that's spelled C-u-l-l-i-f-o-r-d—and

he represented himself to be Senior Vice President of Operations, I believe, with Guilford Transport.

Q. And would you please tell the Court what Mr. Culliford said during that telephone conversation and what you said?

A. In a general sense, Mr. Culliford was interested in locating furloughed employees—excess employees, I refer to them—on the Chessie System, and wanted to know if we would provide him with a list of such employees.

Q. And what did he ask you that that list would have on it?

A. He asked to have that list include their name, their current address, and their telephone number so that he could make contact.

Q. What did you tell Mr. Culliford in that telephone conversation?

A. I told him that I could prepare such a list but I would not be in a position to release such a list and I would have to talk to senior management.

Q. Did you have a subsequent conversation with Mr. Culliford about this matter?

A. I did. That would have been Monday, in the late afternoon.

Q. Would that have been approximately the 8th or 9th of [131] April?

A. Yes.

Q. And what did you say during this conversation with Mr. Culliford and what did he say?

A. I told Mr. Culliford that I had spoken with senior management and was declining to provide him with such a list.

Q. Did you have any subsequent conversations with any representatives of Guilford Transportation Industries with respect to the request that the Chessie System provide Guilford with a list of excess Chessie employees?

A. Yes.

Q. When was that conversation and with whom?

A. Well, that would have probably been two or three days following my conversation with Mr. Culliford, and

that was a phone call from the Vice President of Human Resources, Personnel, Labor Relations, I guess all together, Mr. Rice, Bob Rice.

Q. And what did Mr. Rice say to you during that conversation with respect to the request for a list?

A. He intimated also that he wanted such a list.

Q. And what did you respond in that conversation to that request?

A. In a like manner as I did to Mr. Culliford two or three days before, that senior management had determined [132] that we were going to remain neutral with respect to the situation experienced by Guilford Transport, and that we would not provide them with such a list.

Q. To your knowledge, has any such list ever been provided to representatives of Guilford?

A. Not to my knowledge.

* * * *

[141] Your Honor, if I may, I'd like the record to reflect the following numbers. These numbers are with respect to the calendar year 1985, and they relate to the Seaboard rail system with respect to which Mr. Moore will be testifying.

In terms of total units interchanged or handled by the Seaboard system in 1985, that's 3,493,976.

Of these, a total of twenty-four ten-thousandths of one per cent, or .0024%, were either received from or ultimately forwarded to the Guilford Transportation Division. This constituted a twenty-three ten-thousandths of one percent of the tonnage handled by the Seaboard, which is .0023%, and four thousandths of one percent of the revenue, .004%.

GEORGE H. MOORE, JR., CHESSIE SYSTEM'S WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. WHITEHEAD:

Q. Would you state your name for the record, please.

A. George H. Moore, Jr.

Q. By whom are you employed, Mr. Moore?

[142] A. Seaboard System Railroad.

* * * *

[143] Q. Mr. Moore, does the Seaboard Railroad have any interconnections with the Maine Central?

A. No, sir, we have no direct connection.

Q. Any with the Portland Terminal Company?

A. No, sir.

Q. Any with the Delaware & Hudson?

A. No.

Q. Any with the Boston & Maine?

A. No.

Q. Approximately how many total interconnections does the Seaboard System have?

A. We presently have about—approximately 390 locations [144] we interchange with other carriers.

Q. And of those 390, how many of them are with these companies that are ultimately owned by Guilford Transportation?

A. None.

Q. Has the Seaboard provided any locomotives or motive power to the Maine Central since this labor dispute commenced?

A. None that I'm aware of, no.

Q. Any with the Portland Terminal Company?

A. No.

Q. Delaware & Hudson?

A. No.

Q. Boston & Maine?

A. No, sir.

Q. Are you aware of any monetary assistance that has been provided by Seaboard to the carriers that have been struck or picketed?

A. I'm not aware of any, no.

Q. Are you aware of any employees that have been provided by Seaboard to the Maine Central?

A. No.

Q. Portland Terminal?
A. No, sir.
Q. Delaware & Hudson?
A. No, sir.
[145] Q. Boston & Maine?
A. No, sir.
Q. Any other facilities or equipment that have been provided to these four carriers during this labor dispute?
A. No, sir.
Q. Does Seaboard have any run-through arrangements, locomotive run-through arrangements with any of these four carriers?
A. No, sir.
Q. Does Seaboard have run-through arrangements with any of the other carriers with which it does connect?
A. Yes, sir, we do.
Q. Would you describe for us briefly some of the run-throughs that Seaboard has?
A. We have a run-through agreement with the Missouri Pacific at New Orleans and Memphis, we have it with the Southern at Wadesboro and also at Knoxville, and we have an arrangement with the CNW out of Chicago.
Q. On the basis of your years of railroading experience, Mr. Moore, are such run-through arrangements common in the railroad industry?
A. They are common, yes.
Q. Without requiring us to take a look at the map, what is the northernmost point that is served by the Seaboard Railroad?
[146] A. Northernmost on the east side would be Richmond, mid would be Chicago—
Q. I take it you have no operation in the states of Maine, New Hampshire, Vermont, New York, Pennsylvania?
A. None of those, no.

* * * *

[148] Q. Mr. Moore, what would be the effects on the Seaboard Rail System if the Brotherhood of Maintenance of Way Employees were permitted to strike and to picket at the Seaboard facilities?
A. Well, there would, of course, be loss of revenue, probably revenue we would never recover, because of the competitive nature, there would be loss of income to the employees--
Q. What would be the effect—
A. —I think Amtrak's would be affected, also the time-sensitive traffic, other industries would be affected, plus the automotive industry. The Seaboard serves a lot [149] of military installations. I think that would be hampered.
Q. What would be the effect of such a strike or picketing on the Seaboard employees, themselves?
A. There would be loss of income to the employees.

[CROSS EXAMINATION BY MR. CLARKE:]

* * * *

[150] Q. And that chart shows that there were approximately 3,843 units forwarded to D&H, MEC or PT?
A. That's correct.
Q. In, I assume, 1985?
A. 1985, yes.
Q. Did that also include the Boston & Maine?
A. No. It was just those three companies.
Q. All right, so we don't have the Boston & Maine in that group, do we?
A. No, it's not listed there.
Q. Do you know whether or not the Seaboard Systems has joint rates or joint tariffs with the Boston & Maine?
A. I'm not aware, but, you know, it's possible.
Q. The total revenue was $5,440,046, is that correct, in that range?
A. Yes, that's correct.
Q. And that was 1985 for those three carriers?
A. 1985.

Q. Now, Mr. Moore, let's, if we can, just go—you were talking about the effects of a strike and what happens.

[151] A. Yes.

Q. You also indicated that the northernmost point the Seaboard serves on the east coast is Richmond, is that correct?

A. That's correct.

Q. That was Acca Yard in Richmond, is that right?

A. That's correct.

Q. Now, let's go back to around the 9th and the 10th of April of this year, and actually go back a little bit before that.

On April 4th, you were aware, were you not, of picketing that occurred by the Brotherhood up at Potomac Yard?

A. Yes. I don't recall the date, but I heard that there were pickets at Pot Yard.

Q. Were you consulted in what should be done to respond to those picketings?

A. No, sir.

Q. Did you, as a result—

Well, when a yard is picketed and the contract employees do not cross the line, do not cross the picket lines and work, does the work stop in the yard?

A. To some extent, somewhere it does stop, but usually supervisory crews will perform work.

Q. Now, after the Potomac Yark was struck—then the [152] strike—or I couldn't say "struck"—when they were picketed, and then the picketing spread down to Acca Yard on the 9th and the 10th of April, do you know what response the Seaboard had to that picketing of the Acca Yard?

A. Yes. We sent supervisory crews to Acca Yard.

* * * *

[153] Q. So when the Acca Yard was picketed, the Seaboard sent up supervisory crews to perform the work in the yard, is that correct?

A. Some were, yes. We were concerned about getting the Seaboard traffic handled at Acca Yard.

Q. Now, that response of sending up supervisors to perform the contract work is the typical response, is it not, of a railroad when its yard is being picketed?

A. That's correct, yes.

* * * *

[161] WILLIAM LA RUE, DEFENDANTS' WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. CLARKE:

Q. Sir, would you please state your name, and spell your last name for the court reporter?

A. My name is William LaRue, L-a-R-u-e.

Q. Mr. LaRue, what is your present occupation?

A. I'm the International Vice President, Brotherhood of Maintenance of Way, presently assigned to the Northeast Region.

Q. Mr. LaRue, do you have any connection with a strike that is ongoing between the Brotherhood and the Maine Central and Portland Terminal Railroads?

A. Yes, since the inception of the strike, I have been in charge in overseeing the entire matter.

* * * *

[165] Q. Mr. LaRue, going to the early part of April of 1986, can you tell us whether or not the Brotherhood made a decision as to whether it would begin picketing in the Chicago area at some time in the near future?

A. We most certainly did.

Q. Can you tell us what that decision was, and then will you explain why it was made?

[166] A. The decision to picket in the Chicago area was based on the fact that we were unable to maintain a non-traffic flow from the Buffalo area which mainly is the entrance from Chicago for grain and other commodities, the purpose being was that it was necessary that

we stop the incoming traffic from the other carriers who were involved.

* * * *

[170] Q. Now, from your review of various filings with the ICC and from your review of the different materials that you have had at your disposal prior to and during the strike, do you know whether or not—do you have an opinion as to whether or not Chicago is an important part of the traffic flow for the Maine Central and Portland Terminal?

A. Chicago is obviously very important. Some of the chemicals come from Chicago, as well as the raw materials needed to make paper.

The problems, again, such as at Buffalo, the trains are stopped in the other yards. Unless we are able to stop the traffic—the only traffic the Delaware & Hudson has, and it has been spelled out a hundred times in a hundred different testimonies in a hundred different places, is all overhead traffic.

* * * *

[172] Q. Now let's, if we can, go back, leave Chicago for a little bit, and go back to the Maine Central and the Portland Terminal.

As a result of the strike on the Maine Central and the Portland Terminal, do you have any information—just answer yes or no—as to the number of people on the Maine Central, Portland Terminal, Boston & Maine, and Delaware & Hudson who are honoring the picket line?

A. My closest guess would be—

Q. No. Just yes or no. Do you have any information as to the number of people that are honoring the picket lines?

A. Only approximately.

Q. All right, let's, if we can, go to this: Do you know [173] the number of people that are employed in contract positions, approximate number, by those four carriers?

A. Approximately 4,000.

Q. Now, where did you get that information from?

A. That information came from the Railroad Retirement Board and the number of filed unemployment forms that they are now processing.

Q. Now, as a result of the strike that you have had against the Maine Central and Portland Terminal, which is now—picketing has spread to the D&H and the Boston & Maine, do you know whether or not the majority of the contract people have honored the picket lines?

A. To my best knowledge, better than 95%.

Q. Now, has that stopped the Boston & Maine, Maine Central, D&H, and Portland Terminal, or have all their operations ceased, as a result of approximately 95% of their contract employees not working?

A. The answer is not completely stopped, no.

Q. Why not?

A. Mainly because their management people are presently working and some unidentified people have been brought in.

Q. In order to—first of all, now, let's see if we can go back a little bit in time historically—on the history on this.

At the present time, are the Brotherhood and [174] Guilford, the Maine Central, Portland Terminal, negotiating for new rates of pay, rules and working conditions?

A. You say are we negotiating?

Q. Yes.

A. They have refused to negotiate.

Q. Excuse me, I didn't hear what you said.

A. They have refused to negotiate.

Q. When did they refuse to negotiate?

A. They left negotiations on March 16th and they refused to negotiate on April 2nd.

Q. Have there been any sessions where the Brotherhood and the Guilford System have sat down, since April 2nd of 1986, to negotiate a resolution to the strike up on the Maine Central/Portland Terminal?

A. There has not been since March the 3rd. The only negotiations were public interest meetings called by the National Mediation Board, the last being on April 3rd, at which time they walked out and refused to meet with us.

* * * *

[175] Q. Now, in order to—let's go back. You have indicated that there was still a movement of traffic on the Maine Central, Portland Terminal, Boston & Maine, and Delaware & Hudson. Has the Brotherhood made any determination as to how it should try to stop that movement of traffic on those [176] lines?

A. The first thing we should do is stop other carriers coming in on that line and giving them power which they do not have available to them.

Q. Besides that, besides stopping the power, has the Brotherhood made any other determinations as to how it should stop the movement of traffic on those lines?

A. We will make whatever efforts we can to those people who are aiding, and create a secondary picketing to stop the flow of traffic.

Q. Now, you have already indicated that Chicago is important to the flow of traffic, at least in your opinion, of the Maine Central and Portland Terminal, is that correct?

A. That's correct.

Q. What has the Brotherhood determined to do in order to interject or stop the traffic from going through Chicago that eventually winds up over in the Maine Central/Portland Terminal?

A. At this point, I don't—I don't have an answer for you. We intend to secondary picket those carriers which are supplying and aiding.

Q. Going back, if we can, to around April 9th of 1985—1986—excuse me—was there a determination made to picket the Burlington Northern?

A. At that point, there was no determination to picket [177] the Burlington Northern, no.

Q. Had there been a determination made to try to picket in the Chicago area?

A. It had been discussed, and it was determined at that time with 110 people that we would select other locations.

Q. Now, is the Chicago Terminal an area where the Brotherhood eventually wants to set up pickets?

A. Most certainly.

Q. And, finally, again, why does the Brotherhood believe it's important—first of all, can you tell us whether or not the Brotherhood believes it is important to its dispute with the Maine Central to picket in the Chicago area?

A. We must stop the traffic if we intend to be able to settle our dispute.

* * * *

[181] A. Well, up until the end of March, there was no movement of traffic, or almost a complete zero movement of traffic.

MR. KIPPERMAN: Objection unless the foundation is laid for that conclusion.

THE COURT: All right. The question was, "Why is this important to you?", and the answer was, "Up until March . . . ."

Why don't you back up with a little more foundation?

MR. CLARKE: I will, your Honor.

BY MR. CLARKE:

Q. Why is it important to you in the conduct of your strike to have the picket captains report in to the headquarters what they see?

A. Well, we must know how effective we are picketing, and if we have missed a location at which we are able to stop the traffic.

Q. Now, from—you indicated that near the end of March you believed that your picketing was quite effective. Was that—just yes or no—is that correct?

A. That is correct.

Q. All right, what did you base that information—that opinion on?

A. We based that opinion upon the people from the local [182] area who normally know the amount of traffic.

* * * *

Q. Now, based upon this information that you received, you had an opinion as to the effectiveness of your strike as of the end of March, is that correct?

A. That's correct.

Q. And what was that opinion?

A. Our opinion was that the traffic was almost at a zero level.

Q. Now, did something occur after that point up until around the 10th of March—10th of April—that made you change your opinion?

A. Yes. We saw more traffic moving. We had foreign engines then coming off the property.

By approximately the 15th of March, most of [183] the Maine Central and Portland Terminal, Delaware & Hudson and B&M engines were ineffectively working and were being transported to outside contract shops.

Towards the end of March and in the first week of April, three or four different railroad engines appeared.

Q. Now let's go to you, yourself, and go into the second week in April. Did there come a time that you actually saw some foreign engines on any of the Guilford Systems?

A. Yes, I did.

Q. When did that occur, approximately?

A. Well, I viewed Pittsburg & Lake Erie engines in Portland, I viewed Norfolk & Western engines in Portland, I went to Albany, and I viewed Western Maryland engines in around the Colony area.

* * * *

[184] [THE COURT]: Why don't you just identify where you personally saw these foreign engines?

THE WITNESS: I saw the foreign engines approximately 7 to 10 miles above Albany on a southbound movement from Mechanicsville, which is on the Rouse's Point line. Rouse's Point is located a few miles from the Canadian border. Coming south Mechanicsville is the joint yard of the B&M, and you will find Colony right below that point and above Albany.

* * * *

[185] Q. Now, Mr. LaRue, we'll get down to the one final question again. In order to get the Maine Central and the Portland Terminal back to the negotiating table, what do you believe you have to do?

A. I must stop the traffic.

* * * *

[CROSS EXAMINATION BY MR. SCHREIBER:]

Q. Mr. LaRue, have you personally observed any Burlington Northern locomotives on the Guilford lines?

A. Myself, no, I have not personally observed any Burlington Northern engines on the—

Q. Guilford lines?

A. —Guilford lines.

Q. Have you personally observed any Burlington Northern supervisory officers working on the Guilford System since the strike?

A. I have had reports but I have not personally observed it.

[186] Q. Now, Mr. LaRue, you indicated that there were approximately 4,000 union employees on the Guilford Rail System?

A. I believe that that was the figure that I was told are being now processed for unemployment, that's correct.

Q. How many Brotherhood members are there on the Maine Central or Portland Terminal?

A. Are you talking about Brotherhood of Maintenance of Way?

Q. That's correct.

A. There are, active, 110; furloughed, approximately the same number; the total number being 243.

Q. And that's on Maine Central and Portland Terminal?

A. That's on Maine Central and Portland Terminal.

Q. How many Brotherhood members are there on the Delaware & Hudson and the Boston & Maine, if you know, sir?

A. On the Boston & Maine, I do not have an exact figure. Somewhere over 200 active, and approximately the same number in a furloughed status.

On the Delaware & Hudson, I am told that there was 156 active and approximately 100 furloughed, and could be more.

Q. Now, in your position as International Vice President of the Brotherhood, did you participate in the negotiations between the Maine Central and the Brotherhood which led up to the final strike on the Maine Central?

[187] A. I did, sir.

Q. And was that dispute between the Brotherhood and the carrier pursuant to what's referred to as section 6 notices under the Railway Labor Act?

A. That's correct, sir.

Q. And at some point in time, I take it, the negotiations broke down between the parties, is that correct?

A. That's correct, sir.

Q. And was the Mediation Board then asked to intervene and try to mediate the dispute?

A. If I may, I'll explain the whole circumstances, if you would like, sir.

Q. Well, right now I would just like to know if the National Mediation Board—

A. That is correct, sir.

Q. And at some point in time those mediation efforts were unsuccessful, is that correct?

A. That is correct, sir.

Q. And under the Railway Labor Act, and in your knowledge as a union officer, does that leave both parties free to exercise their self-help?

A. That's correct, sir.

Q. And the self-help that was relied upon by the Union was to call a strike against the Maine Central, isn't that correct?

[188] A. That is correct, sir.

Q. And the self-help of the carrier is to try to continue to maintain operations with supervisory officials or any other manner they can pursuant to law, isn't that correct?

A. That's correct, sir.

Q. Now, what dispute, Mr. LaRue, does the Brotherhood have with the Burlington Northern?

A. What dispute does the Brotherhood have with the Burlington Northern?

Q. That's correct.

A. It's my understanding there's a mutual aid agreement among many carriers.

Q. What is your knowledge of a mutual aid agreement between Burlington Northern and the Maine Central?

A. At this time I do not have all the facts, sir.

* * * *

[190] Q. What fact do you have which would indicate that Burlington Northern participates in a strike insurance plan which would benefit the Maine Central in the event of a strike on the Maine Central? What fact do you have, sir?

A. Today, sir, I do not, or we would have struck the Burlington Northern.

Q. So you admit you have no basis for striking the Burlington Northern based on the mutual aid theory of yours, is that correct?

A. If you state it that way, that is correct, sir.

Q. Now, as I understand it, based on your direct testimony, you indicated that one of your objectives is to block the movement of paper which originates on the Maine Central and is destined to points in the midwest, is that correct?

A. I didn't only say paper. Any traffic, sir.

Q. But am I correct that your direct testimony was that you wanted to block this traffic from moving from Maine to points in the midwest?

A. I wanted to block traffic coming in and going out.

Q. Where is the logical place to block traffic coming in [191] and off the Maine Central? Wouldn't it be at the interchange point that the Maine Central has with connecting carriers?

A. With connecting carriers, sir?

Q. Yes.

A. That is correct, sir.

Q. Is the Burlington Northern a connecting carrier with the Maine Central?

A. I'm not—I can't say that at this time, sir.

* * * *

[196] Q. I understand that you feel that you have the right to secondary picket any railroad that gives aid or assistance to the primary dispute with the Maine Central, is that correct?

A. That's correct, sir.

Q. My question is assuming that a carrier is not giving aid or assistance to the Maine Central, is it still the Brotherhood's position that you have a right to conduct secondary picketing at any point in the United States you feel appropriate?

A. If it becomes necessary, yes, sir.

* * * *

[200] A. No, I do not.

MR. SCHREIBER: That's all I have at this point, your Honor.

Thank you.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. KIPPERMAN:

Q. Mr. LaRue, you testified that, in your view, it was a necessity to picket in Chicago because of the importance of Chicago?

A. Yes, I did, sir.

Q. Do you consider Los Angeles as important?

A. I considered Los Angeles at the time as important, yes, sir.

Q. And has there been any picketing in Los Angeles?

A. That, I'm not sure of, sir.

Q. Perhaps I could refresh your recollection. Has there been any picketing of the Union Pacific in Los Angeles?

A. I understand that there was a miscommunication. Again, I'm not—I'm not sure to what extent, sir.

Q. Yes, but this miscommunication, from what I have heard, resulted, in picketing; isn't that correct?

A. It's very possible, sir. I was not there, believe me.

Q. Do you know for how long that picketing lasted?

A. No, sir, I do not have a report on that, sir.

[201] Q. And were you aware that picketing stopped only because there was communication of a temporary restraining order from the lawyer in these proceedings to the pickets in Los Angeles?

A. I'm sure if they received them—it has always been my instructions if a temporary restraining order is put out, they are to leave immediately, yes, sir.

Q. And do you know why there was picketing of the Union Pacific in Los Angeles?

A. My understanding is, and I was introduced to it by a man by the name of Mr. Sterlingworth, who is a road foreman, and one other person from the UP.

Q. Do you know when that picketing occurred?

A. An exact date, sir? I would say it was Thursday —if you can tell me what today is, I might be able to help you.

THE COURT: Today is Monday, April 21st.

THE WITNESS: Okay, it would have been Thursday the past week ago, I believe.

* * * *

[CROSS EXAMINATION BY MR. LANE:]

[206] Q. Would you agree with my characterization if I said that the telegram states that you have no alternative but to ask your members and other railroad employees to withdraw their services from those railroads which are participating or which have participated in this mutual aid arrangement?

A. I believe that's a good characterization, sir.

Q. Has Santa Fe Railroad participated in some mutual aid arrangement that you referred to in that letter?

A. You say have they?

Q. Yes.

A. Let's put it this way: I have no positive proof that I can lay before this court.

Q. Did you investigate whether Santa Fe had any participation in any mutual aid arrangement?

A. Again, I have no positive proof that I can lay before the Court, sir.

[207] Q. Do you know if anybody else from the Union investigated to see if Santa Fe had participated in one of these arrangements?

THE COURT: You mean, again, the Brotherhood?

MR. LANE: Yes.

BY THE WITNESS:

A. It has been investigated. We have received information. But I have no positive proof.

Q. Well, what steps did the Brotherhood take to investigate Santa Fe's participation?

A. Let me say this—and I may be out of order, and I may be corrected—there's an active list of those carriers throughout the United States who are part of mutual aid arrangements.

Q. My question was what steps did the Brotherhood take to investigate whether Santa Fe participated in any mutual aid arrangements?

A. Again, I have no positive proof, sir.

Q. You are in charge of the strike, and you would know, if anybody knew at the Union, is that right?

A. Again, I have no positive proof.

* * * *

[CROSS EXAMINATION BY MR. WHITEHEAD:]

* * * *

[212] Q. If you can just answer my question. Isn't it a fact that prior to the time the strike commenced, the Brotherhood was engaged in local negotiations with the Maine Central and the Portland Terminal on behalf of the employees who are Brotherhood members or employed by those two carriers?

A. That is correct, sir.

Q. All right, and it was those negotiations that ultimately broke down and led to the conception of the strike, isn't that correct?

A. That is correct, sir.

* * * *

[215] Q. And, therefore, the processes under Section 6 of the Railway Labor Act with respect to the establishment of wages and working conditions with the Boston & Maine and the Delaware & Hudson, they haven't been completed either, have they?

A. As far as I know, you are correct, sir.

Q. Isn't it true, then, that the only carriers with respect to which the processes of negotiations have been completed are the Maine Central and the Portland Terminal, and that's why those carriers were struck?

A. That's correct, sir.

Q. All right, now, you didn't initially picket or strike the Delaware & Hudson or the Boston & Maine, did you?

[216] A. No, we did not, sir.

Q. In fact, you started your picketing against the carriers with whom you had your primary dispute?

A. That's correct, sir.

Q. The Maine Central and the Portland Terminal. And when that picketing didn't bring enough pressure to cause the Maine Central and the Portland Terminal to capitulate, you decided to widen the scope of your picketing, didn't you?

A. That is not true, sir.

Q. Well, why did you widen your scope beyond the Maine Central and the Portland Terminal?

A. It's a matter of court record that the Delaware & Hudson and the Maine Central management—excuse me —the Delaware & Hudson and the Boston & Maine management came on to the Maine Central property and made efforts to operate that railroad.

Q. Isn't it true that if you, in fact, had been successful in bringing the Maine Central and the Portland Terminal management to their knees as a result of your picketing activity, it wouldn't have been necessary for you to broaden your strike to include the D&H and the B&M, isn't that correct?

A. Had those carriers stayed on their carriers, we would have found no necessity to go off the Maine Central and Portland Terminal.

* * * *

[218] Q. I'm asking you now, with respect to the Maine Central and the Portland Terminal Company, is there any direct interchange of traffic between any of the Chessie System railroads or the Seaboard Rail System with either the Maine Central or the Portland Terminal Company?

A. No, I don't believe there is at this point, sir.

* * * *

[REDIRECT EXAMINATION BY MR. CLARKE:]

* * * *

[220] Q. Well, do you remember the questions dealing with the logical place to put up a picket is the place where the traffic is interchanged with the carrier being struck?

A. That, we have tried, yes, sir.

Q. Does that work?

A. No, sir.

Q. Why not?

A. Because the carrier will run them right through you.

Q. So what do you have to do to stop the traffic from going in?

A. You have to go beyond that carrier and hit them at the next interchange point.

* * * *

[222] [Q.] Is the Brotherhood at this time attempting to engage in picketing of the BN, the Santa Fe, the B&O, or the UP to change rates of pay, rules, or working conditions with those carriers?

A. Absolutely not.

Q. If you engage in picketing against those carriers, whose rates of pay, rules, or working conditions are you trying to change?

A. My only concern from the outside was the Maine Central and the Portland Terminal.

* * * *

[232] LOUIS MALONE, DEFENDANT'S WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. CLARKE:

Q. Mr. Malone, would you please state your name, and spell your full name for the court reporter?

A. My name is Louis Malone. It's spelled L-o-u-i-s M-a-l-o-n-e.

Q. Mr. Malone, what is your occupation at the present time?

A. I'm the General Counsel for the Brotherhood of Maintenance of Way Employees.

* * * *

[236] Q. Tell us whether or not you had that position prior to March 3rd, 1986?

A. Yes, I have.

Q. Now going to March 3rd, 1986, do you know if any event occurred between the Brotherhood and Maine Central Railroad or Portland Terminal?

A. Yes, we commenced picketing.

Q. Now, going forward from that, do you know whether or not the Brotherhood has—first of all, just answer yes or no, if you could—do you know whether or not the Brotherhood has formed a position as to whether it should engage in picketing of carriers who are not part of the Guilford System?

A. Yes, we have.

Q. Did you participate in the formulation of that decision?

A. Yes, I did.

Q. What is that decision?

A. That decision is that we should picket any carrier that supplies traffic to the struck carrier.

Q. Now, is that over and apart, separate from, the mutual aid problem?

A. Yes, it is.

Q. So, now, as far as the mutual aid, if the Brotherhood subsequently learned that there is a strike insurance plan in existence that includes the Guilford System, do you [237] know whether or not the Brotherhood has any intentions, once it learns that fact, as to what it will do with those carriers?

A. Yes, I do.

Q. And what is that?

A. They will picket them.

Q. Now putting aside the mutual aid, is that separate and distinct from the picketing of the traffic carriers?

A. Yes, it is.

Q. Now, did you participate or have any—did you participate in the decision about Chicago?

A. Yes, I did.

Q. Why was that decision made?

A. We determined that Chicago was a principal place for traffic flow.

Q. Traffic flow to whom?

A. To the struck carriers, to the Guilford System.

* * * *

Q. Why would the Brotherhood engage in picketing of carriers that have traffic that flows to or from the Guilford System? What's the purpose?

A. Put economic pressure on Guilford.

Q. How does it do that?

[238] A. You can picket the primary locations, but if you are ineffective at shutting down all the traffic, the traffic must originate someplace else, and you have got to stop all the traffic going in.

* * * *

CROSS EXAMINATION

BY MR. SCHREIBER:

Q. Mr. Malone, does your definition of the right to picket any carrier that supplies traffic mean that any carrier that participates in a movement that either originates or terminates on the Maine Central is the target of your secondary picketing?

A. Anywhere on the Guilford System.

Q. Mr. Malone, evidence in the record in the Burlington Northern case indicates that Burlington Northern participates in traffic which either originates or terminates on the Maine Central at the rate of approximately three cars per day out of 9,000 cars handled on the BN System.

Given that fact, does that fit within your definition that Burlington Northern is a carrier that supplies traffic to the Maine Central?

A. Yes, it does.

Q. And you assert that you have the right to conduct secondary picketing against Burlington Northern and have [239] threatened to do so on that basis?

A. We have the right to do it.

Q. And that's who you intend to conduct your secondary picketing, as I understood your direct testimony, is that correct?

A. We could direct our secondary picketing against those railroads, yes.

* * * *

CROSS EXAMINATION

BY MR. WHITEHEAD:

Q. Mr. Malone, do you know of any carrier in the United States that does not provide traffic, based upon your definition, to some of the Guilford companies?

A. No, I don't

Q. So, in other words, it's your position that you ought to be able to shut the entire national transportation industry down anywhere in the country, isn't that right?

A. It's my position that we can engage in secondary picketing.

• • • •

No. 86-39 (7)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, BALTIMORE AND OHIO CHICAGO TERMINAL COMPANY, CHESAPEAKE AND OHIO RAILWAY COMPANY, and CSX TRANSPORTATION, INC.,

Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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November 20, 1986

QUESTIONS PRESENTED

1. Whether the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, prohibits secondary picketing and empowers a federal court to enjoin such picketing, notwithstanding the restrictions on the court's equity power embodied in the Norris-LaGuardia Act.

2. Whether the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, precludes a federal court from enjoining secondary picketing by a rail union against rail carriers no matter how remote the connection between the primary employer and the picketing victims.

PARTIES TO THE PROCEEDING

Other respondents, in addition to those in the caption, are the following listed International and Local officers of the respondent labor organization: *

O.M. Berge
O.E. Henderson
D.D. Bartholomay
W.E. Merrill
J.T. McGill
M.H. Fleming
G. Vallera
G.L. Hockaday
W.A. House
L. Gonzalez
J. Dodd
T.A. Denton
F.E. Wallace
N.J. Marquar
B.L. Watts
A.J. Popp
D.E. DeLoach

---

* The corporations which require disclosure pursuant to Rule 28.1 of the Rules of this Court are listed in Pet. App. 62a-70a. One of the petitioners, CSX Transportation, Inc., was formerly incorporated under the name Seaboard System Railroad, Inc. It changed its name on July 1, 1986.

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OCTOBER TERM, 1986

No. 86-39

BURLINGTON NORTHERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, BALTIMORE AND OHIO CHICAGO TERMINAL COMPANY, CHESAPEAKE AND OHIO RAILWAY COMPANY, and CSX TRANSPORTATION, INC.,

Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR PETITIONERS

Petitioners Burlington Northern Railroad Company ("Burlington Northern"), Union Pacific Railroad Company and Missouri Pacific Railroad Company (collectively "Union Pacific"), The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe"), Baltimore and Ohio Railroad Company ("B&O"), Baltimore and Ohio Chicago Terminal Company ("B&OCT"), Chesapeake and Ohio Railway Company ("C&O"), and CSX Transportation, Inc. ("CSXT") (hereinafter "the Railroads") seek reversal of the decision and judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 793 F.2d 795 (7th Cir. 1986). The opinion of the district court (Pet. App. 24a-45a) granting the Railroads' motions for a preliminary injunction is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1986. Pet. App. 48a. The order of the court of appeals denying rehearing was entered on July 8, 1986. Pet. App. 46a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case concerns the proper interpretation of certain sections of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 152; 152 First, Second and Seventh; 155 First; 156; 157 and 160; and certain sections of the Norris-LaGuardia Act, 29 U.S.C. §§ 104 and 113. Those statutory provisions and other related sections are reproduced in Pet. App. 50a-58a. Those provisions must be interpreted in light of other statutes, including Section 8 (b) (4) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b) (4), and Section 11101(a) of the Interstate Commerce Act, 49 U.S.C. § 11101(a), which are set forth in Pet. App. 59a-61a.

STATEMENT OF THE CASE

1. This case arises out of a bargaining dispute under the RLA between respondent Brotherhood of Maintenance of Way Employes ("BMWE") and two small railroads located in Maine, the Maine Central Railroad ("MEC") and its subsidiary, the Portland Terminal Company ("PT"), which employ 110 BMWE members. Pet. App. 26a. When BMWE and MEC/PT were unable to reach agreement with respect to proposed changes in the wages, hours and working conditions of the BMWE

members and after the parties had exhausted the RLA's procedures for resolution of their dispute (referred to in the industry as a "major" dispute), BMWE instituted a lawful strike against MEC/PT on March 3, 1986.

Later in the month, BMWE extended the picketing to two other small railroads, the Delaware & Hudson Railroad Company ("D&H") and the Boston & Maine Corporation ("B&M"), which are owned by Guilford Transportation Industries, Inc., MEC/PT's parent company. Pet. App. 26a. Subsequently, BMWE attempted to extend its picketing beyond the corporate affiliates of MEC/PT to other eastern railroads. These railroads obtained preliminary orders enjoining such picketing.[1]

On April 8, 1986, the President of BMWE sent a telegram to the Association of American Railroads threatening to extend picketing and/or strike activity to all of the nation's railroads, including all petitioners, in an effort to "shut down the nation's railroad system." Pet. App. 5a. The purported basis for BMWE's threatened picketing was the alleged participation of the nation's railroads in a "mutual aid arrangement" designed to provide money, personnel and material assistance to the MEC/PT.[2] Consistent with its threat, on April 11, 1986,

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[1] *Consolidated Rail Corp.* v. *BMWE*, No. 86-0318T (W.D.N.Y. April 6, 1986), *vacated*, 792 F.2d 303 (2d Cir. 1986); *Richmond, Fredericksburg & Potomac R.R.* v. *BMWE*, No. 86-3544 (W.D. Va. April 11, 1986) (Widener J.), *vacated*, 795 F.2d 1161 (4th Cir. 1986).

[2] In response to this telegram, Association of American Railroads, on behalf of petitioners (with the exception of Burlington Northern) and other railroads, sought a temporary restraining order from the United States District Court for the District of Columbia enjoining the threatened secondary picketing by BMWE. On April 10, 1986, that court denied the motion on the ground that, in the absence of any picketing, the railroads had failed to establish a serious threat of irreparable harm. Pet. App. 31a. Union Pacific, Santa Fe, B&O, B&OCT, C&O and CSXT all voluntarily withdrew from the case pursuant to Fed. R. Civ. P. 41(a)(1)(i) and filed individual actions in the Northern District

BMWE began picketing against petitioner Union Pacific in Los Angeles, California—thousands of miles from the site of the primary dispute.

2. Petitioners operate railroads throughout the United States but, as the court of appeals found, "are strangers to the dispute between the Union and the Maine Central." Pet. App. 5a. Burlington Northern, Union Pacific and the Santa Fe all operate in the west, and each has its easternmost terminus in the Chicago area. B&O, B&OCT, C&O and CSXT operate in the east, but none of the petitioners has any connection or direct interchange of traffic with MEC or PT.[3]

Burlington Northern filed suit on April 9, 1986, in the United States District Court for the Northern District of Illinois and the same day obtained a temporary restraining order enjoining secondary picketing by respondents. The other petitioner railroads filed complaints on April 10 and also secured temporary restraining orders. The suits were consolidated for a hearing, and, on April 23, the district court issued a preliminary injunction against BMWE's picketing. Pet. App. 24a-45a.

The district court first considered the applicability of Section 1 of Norris-LaGuardia, 29 U.S.C. § 101, which generally precludes federal courts from issuing an injunction "in a case involving or growing out of a labor dispute." Relying upon *Ashley, Drew & N. Ry.* v. *United Transportation Union*, 625 F.2d 1357, 1363 (8th Cir.

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of Illinois, where secondary picketing on their lines was threatened. Subsequently, the District Court for the District of Columbia declined to issue a preliminary injunction. *Brotherhood of Maintenance of Way Employes* v. *Ass'n of American R.R.*, 639 F. Supp. 220 (D.D.C.), *aff'd sub nom., Central Vermont Ry., Inc.* v. *BMWE*, 793 F.2d 1298 (D.C. Cir. 1986).

[3] B&O and C&O connect at two locations with D&H, a corporate affiliate of MEC/PT, but D&H is not a primary disputant in this case. Pet. App. 35a-36a.

1980), and *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R.*, 362 F.2d 649, 654-55 (5th Cir.), *aff'd by an equally divided court*, 385 U.S. 20 (1966), the district court held that, when a secondary employer seeks to have a union's activity enjoined by a federal court, the case "involves or grows out of a labor dispute" within the meaning of Norris-LaGuardia *only* when the secondary employer is " 'substantially aligned' in some material way with the railroad with which the union has its primary dispute. . . ." Pet. App. 31a. Finding that "none of the plaintiff railroads participate in any alleged 'mutual aid arrangement' with MEC/PT" (Pet. App. 27a) and that none of the petitioners directly exchanges traffic or connects with MEC/PT (*id.* at 36a),[4] the district court found that petitioners were not substantially aligned with MEC/PT.[5]

Having concluded that it had jurisdiction to enter an injunction, the district court balanced the relative severity of the harms that would befall the parties if an injunction were granted or, alternatively, were denied, and also considered petitioners' likelihood of success on the merits. Pet. App. 44a. The district court found that petitioners had satisfied their burden with respect to these issues and granted a preliminary injunction, concluding (*ibid.*):

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[4] The district court found that even the indirect interchange of traffic between MEC/PT and petitioners was *de minimis*. Pet. App. 32a-35a. Thus, in 1985, traffic originating or terminating on Guilford lines, including MEC/PT, accounted for the following percentages of the traffic carried by petitioners: Burlington Northern 0.43%; Union Pacific 0.019%; Santa Fe 0.11%; C&O/B&O less than 1%.

[5] The district court also held that the case did not "grow out of" a labor dispute because BMWE was applying pressure designed to induce petitioners to violate their common carrier obligation under the Interstate Commerce Act (49 U.S.C. § 11101(a)) to provide "safe and adequate service" without discrimination. Pet. App. 38a-40a.

> "Based upon the threatened disruption of the nation's rail service, the Court finds that the public interest weighs heavily in favor of the issuance of the preliminary injunction, which will ensure the continued interstate transportation of vital goods."

3. The court of appeals reversed. Pet. App. 1a-23a.[6] First, the court of appeals held that the RLA does not prohibit secondary picketing of any kind. Pet. App. 12a-17a. Relying heavily upon this Court's decision in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969), the court of appeals concluded that, "[u]ntil Congress acts, secondary activity is to remain unregulated." *Id.* at 17a. The court recognized that its holding would permit secondary picketing of railroads, even though a principal purpose of the RLA was to " 'avoid any interruption to commerce or to the operation of any carrier engaged therein' " (*id.* at 14a), and that such secondary picketing "has been banned in every other industry." *Id.* at 12a. Nonetheless, the court of appeals held that the RLA did not preclude secondary picketing in the railway industry because Congress' "goal" in enacting the RLA "is not itself a rule of law." *Id.* at 14a.

Second, the court of appeals held that, even if the RLA rendered secondary picketing unlawful, Norris-LaGuardia would still preclude a federal court from issuing an injunction to prevent such a violation. Pet. App. 17a-19a. The Court concluded that an injunction to enforce the RLA is permissible only to remedy violations of the negotiation and mediation processes of the Act. *Id.*[7]

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[6] Following entry of the preliminary injunction by the district court, respondents filed a petition for a writ of certiorari before judgment in this Court. No. 85-1852. After the court of appeals reversed, BMWE stipulated on June 12, 1986, to the dismissal of its petition for certiorari before judgment, and the petition was dismissed on June 16, 1986, pursuant to this Court's Rule 53.

[7] On May 16, 1986, following the commencement of secondary picketing by BMWE against Conrail, President Reagan issued Executive Order No. 12557, convening an Emergency Board under Section 10 of the RLA, 45 U.S.C. § 160. The President determined that the disputes between BMWE and MEC/PT "threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service." As a result, BMWE's primary and secondary picketing ceased while the Board was convened. Emergency Board No. 209 investigated the dispute and issued a report dated June 20, 1986, recommending that BMWE accept the offer made by MEC/PT prior to commencement of the strike and further that MEC/PT grant future wage increases and benefits similar to those reached in negotiations with national carriers.

The Emergency Board's recommendations did not resolve the MEC/PT-BMWE dispute, and, therefore, Congress passed a joint resolution on August 11, 1986, both establishing an advisory board to investigate the dispute and submit a report to Congress and also prohibiting any changes in the *status quo* by either party until September 19, 1986. H.J. Res. 683, 99th Cong., 2d Sess. (1986). The President signed the resolution into law on August 21, 1986. Pub. L. No. 99-385, 99th Cong., 2d Sess. (1986). The advisory board submitted its report to Congress on September 8, 1986, recommending that, in the event the parties to the dispute were still unable to reach agreement by September 13, 1986, Congress should enact legislation directing the parties to accept and apply the recommendations of Emergency Board No. 209.

On September 23, 1986, Congress adopted S.J. Res. 415, 99th Cong., 2d Sess. (1986), and on September 30, 1986, President Reagan signed it into law. Pub. L. No. 99-431. The law provides that the recommendations of Emergency Board No. 209 are binding on MEC/PT and BMWE. The passage of Pub. L. No. 99-431 does not render the instant case moot for the reasons explained by petitioners in their Supplemental Brief filed with the Court on October 2, 1986, prior to the grant of certiorari. Respondents agree that the case is not moot as a result of these developments. *See* letter of John O'B. Clarke, Jr., counsel for respondents, to Hon. Joseph F. Spaniol, Jr., October 1, 1986.

SUMMARY OF ARGUMENT

The decision of the court of appeals permits a railway union involved in a dispute with a single railroad in Maine to picket all railroads throughout the country in an effort to "shut down the nation's railroad system." Pet. App. 5a. Under the decision of the court of appeals,

the burden of respondents' dispute "with a tiny railroad in New England" will be borne not only by petitioners and all other neutral rail carriers but also by the nation's consumers of everything from food to electricity and by the many citizens dependent upon the nation's rail system for both local and intercity passenger transportation. Moreover, the conclusion of the court below—that Congress, in enacting the RLA, intended secondary activity by rail unions to be unregulated—would permit BMWE and its members to picket with impunity not only any rail carrier in the country but also shippers of all varieties of commodities that in any way use the transportation services of the primary employers. Thus, a geographically-isolated dispute between a single railroad and a mere handful of its employees could, if the court below is correct, send shockwaves through our national economy. The court of appeals' conclusion that this is what Congress intended defies common sense. And, in fact, Congress did not so intend.

1. Congress, in enacting the RLA in 1926, did not mean thereby to legitimate secondary picketing of neutral rail carriers such as petitioners, conduct which was unlawful in 1926 and had always been unlawful. Section 2 First of the RLA, for example, requires that both management and labor "exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . in order to avoid any interruption to commerce." While the Act itself does not expressly define the permissible self-help that unions and carriers may exercise once the Act's lengthy and intricate "major dispute" resolution procedure has been finally exhausted, the structure and purpose of the RLA clearly show that Congress never intended "the law of the jungle" to prevail in rail-labor disputes. This Court recognized as much in *Brotherhood of Railway and Steamship Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238 (1966), where it restricted self-help remedies of a struck carrier in light of the overall policies of the RLA.

The structure, purpose and legislative history of the RLA make plain that Congress' overriding concern was to prevent, if at all possible, interruptions in interstate commerce in the critical rail industry. It is inconceivable that the same Congress that crafted a laborious procedure designed to avoid service interruption by requiring the primary disputants to engage in "negotiation, negotiation, and more negotiation" (Pet. App. 14a), would at the same time have intended that a rail union that has exhausted this seemingly interminable process with a single carrier would then have the absolute right to "shut down the nation's railroad system" (*id.* at 5a) by picketing wholly neutral carriers in an effort to force those carriers to violate their statutory duties under the Interstate Commerce Act.

Even if the RLA were ambiguous with respect to the legality of BMWE's secondary activities, all doubts should be resolved in petitioners' favor on the basis of the national labor policy embodied in the clear prohibition against such conduct in the National Labor Relations Act. This Court has never hesitated to turn "to the NLRA for assistance in construing the Railway Labor Act." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969). If the BMWE were anything but a union of railroad employees, its conduct would be in manifest violation of Section 8(b)(4) of the NLRA, 29 U.S.C. § 158(b)(4). No logical reason exists for a different result to occur under the RLA.

2. The court of appeals also erred when it concluded that federal courts are powerless, because of the restrictions contained in the Norris-LaGuardia Act, to enjoin rail union secondary picketing, even if such conduct violates the RLA. In so ruling, the court misconstrued a long line of decisions of this Court that have recognized that the strictures of Norris-LaGuardia must be accommodated to the RLA where injunctive relief is necessary to further the RLA's purposes, policies and provisions.

3. Moreover, there is no conflict between the prohibitions in the RLA and the Norris-LaGuardia Act in the extreme circumstances presented by this case. Section 4(a) of Norris-LaGuardia prohibits injunctions only in cases growing out of a "labor dispute." Courts of appeals have correctly held that Section 4's prohibition is limited in railroad cases to injunctions against picketing of primary employers or those who are "substantially aligned" with a primary employer. *Ashley, Drew & N. Ry.* v. *United Transportation Union*, 625 F.2d 1357 (8th Cir. 1980); *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir.), *aff'd by equally divided court*, 385 U.S. 20 (1966). It is undisputed that petitioners are not at all aligned with the primary employers in this case. Therefore, an injunction against BMWE's attempt to shut petitioners down is outside the ambit of the Norris-LaGuardia Act's prohibition and may be issued to enforce the mandates of the Interstate Commerce Act and Railway Labor Act.

ARGUMENT

I. SECONDARY PICKETING OF NEUTRAL RAIL CARRIERS BY A RAIL UNION VIOLATES THE RAILWAY LABOR ACT.

A. The Structure, Purpose And Legislative History Of The RLA Demonstrate That Congress Did Not Intend Secondary Picketing To Be Permissible Rail Union Conduct.

The central issue raised in this case is whether Congress intended to permit secondary picketing by rail unions when it enacted the Railway Labor Act of 1926.[8] The Act does not explicitly permit secondary picketing. Thus, while it is true, as the court of appeals observed (Pet. App. 13a), that "[c]ourts must abide by the legislative choice," there is no evidence that Congress *chose*

[8] Act of May 20, 1926, c.347, 69th Cong., 1st Sess., 44 Stat. 577, 45 U.S.C. 151, *et seq.*

to permit the secondary picketing threatened by BMWE. In fact, the available evidence strongly indicates that Congress chose to continue the existing prohibition of secondary picketing against railroads. The court of appeals correctly acknowledged that at the time of the RLA's enactment secondary picketing was clearly unlawful in the railroad industry. Pet. App. 13a-14a. It is incredible to assume that Congress, as a result of the Act's silence, intended in 1926 suddenly to legalize such uniformly condemned conduct. It is much more reasonable to infer, in view of the Act's purposes, that pure secondary picketing remained illegal in 1926 after Congress enacted the RLA. Indeed, in the over one-hundred year history of the railroad industry, until the decisions issued this year in connection with BMWE's secondary conduct,[9] rail unions have never been permitted by the courts to picket purely neutral rail lines.[10]

But, instead of seeking to further Congress' overall objective under the RLA of preventing interruptions of interstate commerce, the court below dismissed this objective with the observation that "this goal is not itself

[9] In addition to the decision at issue here, *see Central Vermont Ry.* v. *BMWE*, 793 F.2d 1298 (D.C. Cir. 1986); *BMWE* v. *Guilford Transportation Industries, Inc.*, —— F.2d —— (1st Cir. 1986); *Consolidated Rail Corp.* v. *BMWE*, 792 F.2d 303 (2d Cir. 1986); *Richmond, Fredericksburg & Potomac R.R.* v. *BMWE*, 795 F.2d 1161 (4th Cir. 1986); *Norfolk & W. Ry.* v. *BMWE*, 795 F.2d 1169 (4th Cir. 1986).

[10] *See, e.g., Ashley, Drew & N. Ry.* v. *United Transportation Union*, 625 F.2d 1357 (8th Cir. 1980); *Consolidated Rail Corp.* v. *Brotherhood of Railway, Airline & Steamship Clerks*, 84 Lab. Cas. (CCH) ¶ 10,923 (W.D.N.Y. 1978), *app. dism'd*, 595 F.2d 1208 (2d Cir. 1979); *Terminal R. Ass'n of St. Louis* v. *Brotherhood of Ry., Airline & Steamship Clerks*, 458 F. Supp. 100 (E.D. Mo. 1978); *Toledo, A.A. & N.M. Ry.* v. *Pennsylvania Co.*, 54 F. 730 (N.D. Ohio 1893); *Toledo, A.A. & N.M. Ry.* v. *Pennsylvania Co.*, 54 F. 746, 753 (N.D. Ohio), *app. dism'd sub nom., In re Lennon*, 150 U.S. 393 (1893); *Thomas* v. *Cincinnati, N.O. & T.P. Ry.*, 62 F. 803 (S.D. Ohio 1894).

a rule of law." Pet. App. 14a. This assertion conflicts directly with the well-established principle of statutory construction that requires the judiciary to attempt to discern congressional purpose in interpreting any statute and, more important, a long line of decisions from this Court that have looked to the RLA's underlying purposes and policies in formulating specific rules of conduct for rail unions and carriers.

The RLA was the culmination of nearly forty years of federal legislative efforts to create a railway labor law to minimize interruptions in interstate commerce. The roots of these efforts began with enactment of the Interstate Commerce Act in 1887, which created a fundamental common carrier obligation requiring railroads to provide "transportation or service on reasonable request." See 49 U.S.C. § 1(4), recodified as 49 U.S.C. § 11101(a). This common carrier "duty runs not to shippers alone but to the public . . . [The carrier] owes the public reasonable efforts to maintain the public service at all times, even when beset by labor-management controversies . . ." *Brotherhood of Railway & Steamship Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238, 245 (1966). Consistent with its creation of this fundamental common carrier obligation, Congress sought to develop mechanisms that would effectively resolve labor-management disputes with the least disruption to vital transportation services, beginning with the enactment of the Arbitration Act of 1888.[11]

The RLA was passed in 1926 and amended in 1934 to provide a comprehensive framework for the resolution of labor disputes in the railroad industry because of the vital importance of that industry to the commerce

[11] *See generally*, Rehmus, "Evolution of Legislation Affecting Collective Bargaining in the Railroad and Airline Industries," in National Mediation Board, *The Railway Labor Act at Fifty* (1976); Lecht, *Experience Under Railway Labor Legislation* 5 (1955).

of the whole nation. When it considered the RLA, Congress was well aware of the obligations it had placed on rail carriers under the Interstate Commerce Act and of the danger that union picketing activities might interfere with those obligations.[12] The fundamental premise of the RLA is that disputes will be settled by agreement, without any disruption in commerce, and that agreements will be maintained. This premise is embodied in RLA Section 2 First, 45 U.S.C. § 152 First (emphasis added), which provides:

> "It shall be the duty of all carriers, their officers, agents, and employees to *exert every reasonable effort* to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

The duty to "exert every reasonable effort to make and maintain agreements" is not merely precatory. It is legally enforceable and applies even after carriers and employees have exhausted the processes of the RLA. See

[12] During the Congressional hearings both labor and railroad spokesmen were asked whether the proposed bill would legalize union efforts to interrupt interstate commerce. Mr. Richberg replied for the unions: "Now, it certainly is the law today that it is unlawful to conspire to interrupt interstate commerce . . . . We do not need to write it in to any law to make it unlawful . . . ." Hearings on S.2306 before the Senate Committee on Interstate Commerce, 69th Cong., 1st Sess. 88 (1926). Colonel Thom echoed these observations as spokesman for the railroads: "[T]here is nothing in this bill to prevent the use of an injunction to prevent a conspiracy to interrupt transportation." *Id.* at 26. Because the RLA resulted from an agreement between management and labor, this Court has recognized that "the statements of the spokesmen for the two parties made in the hearings on the proposed Act are entitled to great weight in the construction of the Act." *Chicago & N.W. Ry.* v. *United Transportation Union*, 402 U.S. 570, 576 (1971).

Brotherhood of Railway and Steamship Clerks v. *Florida East Coast Ry.*, 384 U.S. 238 (1966) (carrier required to maintain agreements even after onset of strike; only changes within scope of negotiation and any others reasonably necessary to continue operations during strike may be made); *Chicage & N. W. Ry.* v. *United Transportation Union*, 402 U.S. 570 (1971) (RLA provides authority for injunction against strike on showing employees had failed to "exert every reasonable effort" even after exhaustion of statutory processes).[13]

The RLA itself makes plain that it was passed "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. § 151(a). It has always been understood that the "major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes.'" *Texas & N. O. R.R.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548, 565 (1930). See also *Virginia Ry.* v. *System Federation No. 40*, 300 U.S. 515, 547 (1937) ("major objective [of RLA] is the avoidance of industrial strife"); *Steele* v. *Louisville & N. R.R.*, 323 U.S. 192, 199-200 (1944); *California* v. *Taylor*, 353 U.S. 553, 566 (1957); *Detroit & Toledo Shore Line R.R.* v. *United Transportation Union*, 396 U.S. 142, 148 (1969) (RLA passed "in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce").

This dominant concern is amply demonstrated by the statute's legislative history, which contains repeated references to Congress' intent to minimize interruptions to interstate commerce.[14] Congress was particularly concerned that small, localized disputes not be permitted to spread into a nationwide rail shutdown because of the disastrous effects on the public health and welfare such strikes would cause.[15] The suffering that could result from a nationwide rail strike was described in vivid terms by one congressman:

> "Everybody recognizes the absolute importance of the smooth and continued functioning of the railway transportation system. Everybody knows that if that system should be paralyzed even for one week the suffering and death resulting therefrom would be a national calamity."

Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 93d Cong., 2d Sess., *Legislative History of the Railway Labor Act, As Amended (1926 Through 1966)* 238 (1974) (remarks of Rep. Merritt) (hereinafter referred to as "RLA Legislative History").[16] As a result of these concerns, the primary goal of the Act was "to insure to the public continuity and efficiency of

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[13] In *Chicago & N.W.*, 402 U.S. at 578, this Court emphasized that the duty created by Section 2 First is "central to the effective working of the Railway Labor Act."

[14] *See NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 179 (1967) ("labor legislation is peculiarly the product of legislative compromise of strongly held views . . . and [thus] legislative history may not be disregarded merely because it is arguable that a provision may unambiguously embrace conduct called in question).

[15] Thus, the labor spokesman explained during the hearings on the RLA that one of the features of the proposed bill that was a major improvement over the prior law was that the proposed National Mediation Board, unlike the Railway Labor Board, its predecessor, would deal with disputes on a local, rather than national, level and that, consequently, "trouble" would not spread. Hearings on H.R. 9463 before the House Comm. on Interstate and Foreign Commerce, 69th Cong., 1st Sess. 88 (1926) (hereinafter referred to as "House RLA Hearings").

[16] Representative Robison similarly described the effects of the 1922 nationwide shopmen's strike against the railroads:

> "The black shadow which fell across the economic and industrial life of the Nation is still fresh in our minds. Business was stagnant; industry was paralyzed; the health and life of whole communities were threatened. We can in part visualize in a measure what would have been the conditions if there had been a general strike of all the railroad workers." RLA Legislative History at 386.

interstate transportation service, and to protect the public from the injuries and losses consequent upon any impairment or interruption of interstate commerce through failures of managers and employees to settle peaceably their controversies." H.R. Rep. No. 328, 69th Cong., 1st Sess. 1 (1926); see House RLA Hearings at 11 (Statement of D. Richberg); *id.* at 115 (Statement of A. Thom).

In furtherance of this legislative purpose, Congress carefully crafted elaborate procedures designed to "provide for the prompt and orderly settlement of *all* disputes concerning rates of pay, rules or working conditions" and "*all* disputes growing out of grievances or out of the interpretation or application of [collective bargaining] agreements," 45 U.S.C. § 151a(4) and (5) (emphasis added)—the entire universe of railway labor controversies. These have been categorized into "major" and "minor" disputes. See *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 722-28 (1945).

Day-to-day grievances and other disputes concerning the interpretation or application of existing collective bargaining agreements—so-called "minor disputes"—must be resolved through the National Railroad Adjustment Board (RLA Section 3 First, 45 U.S.C. § 153 First (i)) or special arbitration boards established by agreement of the parties. RLA Section 3 Second, 45 U.S.C. § 153 Second. These procedures are compulsory, not optional with the parties, and a strike to enforce grievance demands is a violation of the Act that can be enjoined by the federal courts, notwithstanding the strictures of the Norris-LaGuardia Act. *Brotherhood of Railroad Trainmen* v. *Chicago River & Ind. R.R.*, 353 U.S. 30, 34-35 (1957). See *Brotherhood of Locomotive Eng'rs* v. *Louisville & N. R.R.*, 373 U.S. 33, 41-42 (1963).

The RLA also establishes an elaborate, extended procedure for resolving so-called "major disputes," disagreements that arise between rail unions and management over the formation of new collective agreements or over efforts to change existing agreements. *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. at 723. The Act provides for negotiation, mediation by the National Mediation Board, voluntary arbitration of the dispute and, if the dispute "threaten[s] substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service," the appointment of an emergency board by the President to investigate and report on the dispute. The Act requires the parties to maintain the *status quo* throughout the lengthy process until 30 days after the emergency board has made its report to the President. See RLA §§ 2 Second, 5 First, 6, 7, 10; 45 U.S.C. §§ 152 Second, 155 First, 156, 157, 160.[17] See generally *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. at 378.

Only at the conclusion of this lengthy major dispute resolution process, if the parties have been unable to reach an agreement, does the Act allow a rail union to strike the carrier with which it has the dispute in order to attempt to force an accommodation and to reach an agreement. See *Brotherhood of Locomotive Eng'rs* v. *Baltimore & Ohio R.R.*, 372 U.S. 284, 291 (1963). The RLA itself is silent with respect to the rights of rail unions to engage in any form of self help, including the right to strike. *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

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[17] The court of appeals described the process as requiring "negotiation, negotiation, and more negotiation." Pet. App. 14a. This Court has observed that "the procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Brotherhood of Railway & Steamship Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238, 246 (1966). *See also Detroit & Toledo Shore Line R.R.* v. *United Transportation Union*, 396 U.S. at 149 (describing major dispute resolution scheme as "an almost interminable process").

See generally, Newborn, *Restrictions on the Right to Strike on the Railroads: A History and an Analysis (I)*, 24 Lab. L. J. 142, 147-148 (1973). However, because Congress rejected the imposition of compulsory arbitration on the parties to force a resolution of major disputes, the Court has construed the Act as allowing strikes in those limited circumstances. See *Brotherhood of Railway & Steamship Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238, 244 (1966); *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 384 (1969); *Texas & N. O. R.R.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U.S. at 566, n.3.[18]

Notwithstanding the fundamental purpose of the RLA to provide machinery for the settlement of "all disputes" in order to prevent interruptions of interstate commerce, the court of appeals found that Congress intended no limitation whatsoever on the picketing activities of a rail union once the major dispute resolution process has run its course.

The instant case illustrates the incongruity created by the court's decision. BMWE initially issued a threat to picket all of the nation's railroads because, it claimed, MEC/PT were receiving financial aid and assistance from other carriers. But even after it became apparent that

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[18] The requirement that the parties to a major dispute observe the *status quo* while the major dispute provisions of the RLA are being exhausted permits an inference that Congress intended to permit a resort to self-help by those parties as to each other once the procedures have been exhausted without resolving the dispute. But, those *status quo* provisions also support an interpretation that Congress did not intend to allow secondary picketing of a carrier not a party to the dispute. This is because the *status quo* obligations in terms are applicable only to the parties to the major dispute. The inference of a right to resort to self-help once the *status quo* ceases to apply is therefore restricted to self-help between the parties to the dispute.

there was no mutual assistance pact,[19] BMWE announced that it would picket any carrier that carried any shipments destined for or originating on the primary disputants. BMWE asserted that it had a right to picket, no matter how geographically remote from the primary dispute, in order to force carriers to refuse to handle MEC/PT traffic.[20] As the court of appeals correctly inferred, BMWE's real goal was to "shut down the nation's railroad system" (Pet. App. 5a), thereby creating a national transportation emergency that would either force MEC/PT to give in to its bargaining demands or force the Congress to intercede and impose a legislative solution to the dispute.

There are an estimated 1,000 railroad agreements involved in local negotiations during any given year.[21] Yet, BMWE would have this Court find that Congress, which was expressly concerned in 1926 with the potentially devastating effects of a nationwide rail strike, nonetheless intended to permit the rail unions involved in each one of these 1,000 local disputes to ignite a nationwide conflagration in order to bring both the primary disputant and the nation's rail transportation system to their knees.[22] They do this for the sole purpose of in-

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[19] As the district court found, undisputed testimony showed that no such mutual aid arrangement existed between petitioners and MEC/PT. Pet. App. 27a.

[20] As discussed at page 28, below, BMWE's secondary picketing sought to force neutral carriers to violate their statutory obligations under the Interstate Commerce Act to handle all property tendered traffic without discrimination.

[21] Rehmus, "The First Fifty Years—and then?" in National Mediation Board, *The Railway Labor Act at Fifty*, 246 (1976).

[22] The devastating ramifications of the decision below applies not only in the rail but also in the airline industry. Congress amended the RLA in 1936 to bring air carriers engaged in interstate and foreign commerce within the Act's scope. Act of April 10, 1936, c. 166, Pub. L. No. 74-487, 49 Stat. 1189. Thus, if sec-

creasing their negotiating leverage with entities (i.e., the primary employer and Congress) other than the victims of their picketing.

In view of the overriding purposes of the Act to minimize disruptions to interstate commerce, the burden should be on those asserting the existence of secondary picketing rights to show that Congress in some fashion expressed its support for the right of a rail union to expand the impact of a dispute beyond the primary carrier. Yet, neither BMWE nor the court of appeals has cited a shred of legislative history to support the far-reaching conclusion that Congress intended to permit the use of secondary picketing in the railroad industry.

The reasonableness of requiring BMWE to show that Congress expressly intended to allow secondary picketing is supported by the undisputed fact that, at the time of the RLA's passage, Congress understood that secondary pressure tactics in the rail industry had uniformly been declared unlawful by the courts under the common law of conspiracy as well as under the statutes protecting the free flow of interstate commerce and the U.S. mail. The court of appeals acknowledged that "[n]o doubt th[e] law [in force in 1926] forbade secondary picketing." Pet. App. 13a.[23] BMWE cannot, however, satisfy its burden to show that Congress intended to legalize secondary activities because the structure, purpose and legislative history of the RLA demonstrate that Congress was fully aware of the illegality of secondary activity

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ondary picketing by rail unions is permissible under the RLA, similar conduct by airline employees is also lawful.

[23] *See, e.g., Toledo, A.A. & N. M. Ry.* v. *Pennsylvania Co.*, 54 F. 730 (N.D. Ohio 1893); *Toledo, A.A. & N. M. Ry.* v. *Pennsylvania Co.*, 54 F. 746, 753 (N.D. Ohio), *app. dism'd sub nom., In re Lennon*, 150 U.S. 393 (1893); *Thomas* v. *Cincinnati, N.O. & T. P. Ry.*, 62 F. 803 (S.D. Ohio 1894); *Southern Cal. Ry.* v. *Rutherford*, 62 F. 796, 797 (S.D. Cal. 1894); *United States* v. *Debs*, 64 F. 724 (N.D. Ill. 1894), *pet. for writ of habeas corpus denied sub nom., In re Debs*, 158 U.S. 564 (1895).

in the railroad industry, and that Congress intended the RLA not to change this prohibition.[24] Contrary to the conclusion of the court of appeals, Congress' failure to insert an express prohibition of secondary picketing in the RLA is *no* evidence of Congress' intent suddenly to authorize such conduct under the RLA. The fact is that Congress did not expressly legitimate the secondary boycott as a weapon that rail labor could permissibly use in the limited circumstance where self-help was authorized under the RLA. Accordingly, Congress did not intend to authorize rail labor to settle its primary disputes through secondary picketing.[25]

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[24] For example, Congressman Fredericks asked the labor spokesman whether the proposed bill set aside or nullified the volume of statutory and decisional law that had developed with respect to labor relations on the railroads. Richberg responded:

> "I do not believe that there is any provision of either statutory law or law written in the courts which this bill nullifies in any way. Now, I am quite sure that it does not in any way disturb the general law regarding industrial relations, ...
> "So that I believe I am quite safe in saying that it does not alter either the statute law or the law written in the courts in any way that is not perfectly apparent upon the face of it as I have indicated." House RLA Hearings at 41-42.

See also id. at 90.

[25] As one commentator, himself a rail union attorney (*see Ranieri* v. *United Transportation Union*, 743 F.2d 598 (7th Cir. 1984)), has observed:

> "The Railway Labor Act said nothing specific about secondary boycotts. It neither singled them out for proscription nor protection. The Act did grant to employees 'the right to organize and bargain collectively . . .' and guaranteed employees the right not to be required to perform services without consent. It seems unlikely, however, that by these provisions or any others of the Act, Congress can fairly be read to have intended, in 1926, to have legalized the secondary boycott, then deemed unlawful under the Interstate Commerce Act or the anti-trust laws." Newborn, *Restrictions on the Right to Strike on the Railroads: A History and Analysis (II)*, 24 Lab. L.J. 234, 248 (1973) (footnotes omitted).

The contrary view adopted by the court of appeals leads to absurdities. It means that the single industry in which Congress was most concerned about strikes is the *only* one in which secondary picketing is allowed. It also means that Congress insisted on elaborate procedures to ensure bargaining over the parties' demands before there can be a strike (and consequent interruption of rail service) arising out of a dispute between a carrier and its employees, but that, once such procedures have been exhausted unsuccessfully with one carrier, the union has *carte blanche* immediately to strike or picket all other carriers, not parties to the dispute (or to the negotiations, mediation and conciliation that accompanied it). Finally, it means that secondary picketing can shut down the nation's entire rail system whenever a local single-carrier dispute is not successfully resolved under the statute's procedures, even though exhaustion of those detailed procedures is absolutely required before even a local shutdown can occur. The notion that Congress intended anything of the kind is unsupportable, particularly since the secondary carrier is powerless to reach agreement with the union concerning the subject of the primary dispute over terms or conditions of employment.[26]

B. The Court Of Appeals Erred In Ignoring The Structure And Purpose Of The Act In Deciding Whether The RLA Prohibits Secondary Picketing.

The court of appeals rejected any analysis of the general purposes of the RLA on the grounds that such an effort "confuses the anticipated effects of the statute with the rules the statute establishes," (Pet. App. 14a), and that the "Railway Labor Act is a statute establishing rules, not a statute establishing goals and calling on the

[26] Moreover, the secondary carrier cannot accede to the union's demand that all traffic bound to the struck primary carrier be stopped without committing a violation of the duties imposed on it by the Interstate Commerce Act. *See* pp. 28-29, *infra*.

judiciary to create the rules." *Id.* at 15a. The court of appeals observed that, based on petitioners' argument, "between 1932 and 1947" railroads would have been "the only industry protected against this practice [secondary picketing]." The court could not imagine that Congress could have intended such a result. Pet. App. 12a.

The court of appeals' refusal to acknowledge that Congress may have intended the railroads to enjoy protections against union picketing not conferred on other industries until the enactment of the Taft-Hartley Act, 29 U.S.C. §§ 154 et seq. (1947) ignores the very special position the rail industry and railway labor legislation have historically enjoyed in this country because of the national interest in the uninterrupted flow of interstate commerce.

> "Of equal or greater significance as a reason for special railroad labor legislation is an historic and pervasive belief that the national welfare necessitates uninterrupted railroad service. This belief has long dominated congressional action in the field of railroad labor legislation."

Rehmus, "Evolution of Legislation Affecting Collective Bargaining in the Railroad and Airline Industries" in National Mediation Board, *The Railway Labor Act at Fifty*, (1976), *supra*, 15. Thus, Congress first enacted comprehensive labor legislation (the Arbitration Act of 1888) for the rail industry almost 50 years before the passage of the National Labor Relations Act. In addition, because of concerns for the possible interruption of interstate commerce, Congress imposed compulsory arbitration to resolve "minor" disputes or grievances on the railroads but has never done so in other industries. Finally, the elaborate "major" dispute resolution process with its mandatory *status quo* provisions is unparalleled outside the rail industry.

Therefore, it is not at all anomalous that Congress, given its sensitivity to the special problems of rail strikes,

would have given that industry between 1932 and 1947 a protection against secondary picketing enjoyed by no other industry.[27] The anomaly that cannot be accepted is the one created by the court of appeals: that after 1947 Congress would have left the nation's most strike-sensitive industry as the only one unprotected from the acknowledged ravages of secondary picketing.

The court of appeals' refusal to assess the legality of secondary picketing based on the fundamental purposes and policies of the RLA is inconsistent with both the understanding of Congress concerning the judiciary's proper function in fleshing out the Act's provisions and a long line of decisions from this Court that have looked to the purposes and policies of the Act in formulating specific rules of conduct for rail unions and carriers alike.

The lack of specifically-enumerated enforceable duties in the proposed RLA was a matter of concern during the congressional hearings. Congressman Garber, in particular, asked labor's spokesman whether such duties ought not be made more explicit. The labor spokesman responded that the representatives of labor and management who had prepared the draft bill had not intended to write an all-inclusive codification of permissible and prohibited conduct, but instead had specifically intended

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[27] It is significant that, during the period between the passage of Norris-LaGuardia in 1932 and Taft-Hartley in 1947, petitioners have been unable to locate any reported decisions in which rail unions engaged in any secondary picketing. By contrast, industrial unions used this self-help remedy repeatedly until prohibited by the passage of Taft-Hartley. *See, e.g., Lee Way Motor Freight, Inc.* v. *Keystone Freight Lines, Inc.*, 126 F.2d 931 (10th Cir.), *cert. denied*, 317 U.S. 645 (1942); *Taxi-Cab Drivers Local Union No. 889 of Oklahoma City* v. *Yellow Cab Operating Co.*, 123 F.2d 262 (10th Cir. 1941); *Amalgamated Ass'n of Street, Electric Ry. & Motorcoach Employees* v. *Dixie Motor Coach Corp.*, 170 F.2d 902, 905 (8th Cir. 1948).

that the Act would take shape by means of judicial interpretation based on its general purposes:

> "We believe, and this law has been written upon the theory, that in the development of the obligations in industrial relations and the law in regard thereto, there is more danger in attempting to write specific provisions and penalties into the law than there is in writing the general duties and obligations into the law and letting the enforcement of those duties and obligations develop through the courts in the way in which the common law has developed in England and America."

House RLA Hearings at 91. The RLA passed Congress without any significant alteration or attempt to specify further the respective duties of the railroads and unions. This Court relied upon this "common law" explanation in *Chicago & N. W. Ry. Co.* v. *United Transportation Union*, 402 U.S. at 576-77, where the Court concluded that RLA Section 2 First created an enforceable legal obligation to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, despite the absence of specific words defining reasonable efforts in the Act.

This Court has repeatedly filled in the interstices in the RLA by looking to the policies and purposes of its drafters in order to discern the rights, duties and obligations Congress intended to create. In *Steele* v. *Louisville & N. R.R.*, 323 U.S. at 202-203, for example, this Court looked to "the purpose of the Act" and created therefrom an enforceable duty of fair representation. Similarly, in *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210, 213 (1944), this Court described the right of a union member to be free from discrimination by his union as a "federal right implied from the statute and the policy which it has adopted." This Court also determined the right of a rail union to settle a member's grievance "by implication from the pertinent provi-

sions" of the RLA because the statute itself was silent. *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. at 729.[28]

Most important, however, this Court has previously undertaken the task of defining the legitimate self-help available to railroads and labor in the event of a lawful strike based on this Court's interpretation of Congress' overriding legislative purpose. For example, in *Brotherhood of Railway & Steamship Clerks* v. *Florida East Coast Ry.*, 384 U.S. at 247, the Court invoked "the spirit of the Railway Labor Act" in carefully delimiting the extent of self-help available to a struck carrier so as to prevent "labor-management relations [from] revert[ing] to the jungle." [29]

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[28] This Court has also analyzed Congress' intentions in cases involving the mechanisms for resolving primary disputes under the RLA where the Act's language provided little guidance. In *Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239, 244 (1950), the Court held the jurisdiction of the National Railroad Adjustment Board to be exclusive based on the Court's reading of Congress' intent. *See also Union Pacific R.R.* v. *Price*, 360 U.S. 601, 608-09 (1959). In *Order of Railway Conductors of America* v. *Pitney*, 326 U.S. 561 (1946), and *Transportation-Communication Employees Union* v. *Union Pacific R.R.*, 385 U.S. 157 (1966), this Court inferred a legislative intent that jurisdictional disputes be resolved through the Adjustment Board in tripartite proceedings. *See also California* v. *Taylor*, 353 U.S. 553 (1957) (Court looked to policies of RLA to determine coverage of state-owned railroads in view of Congressional silence); *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42 (1979) (Court looked to purposes of RLA to determine whether punitive damages are available in suit against rail union in view of Congress' silence).

[29] In *Florida East Coast*, this Court concluded that a struck carrier is permitted to depart from the terms and conditions of the collective bargaining agreement without first exhausting the Act's lengthy major dispute resolution procedures in view of the carrier's right of self-help and its duty under the Interstate Commerce Act to operate to serve the public. Nonetheless, this Court ruled that "any power to change or revise the basic collective agreement must be closely confined and supervised" and must be "truly necessary in light of the inexperience and lack of training of the new labor force or the lesser number of employees available for the continued operation." 384 U.S. at 246, 248.

In the final analysis, the question whether Congress intended to prohibit secondary boycotts under the RLA must be answered against the background of the legislative history of the RLA and subsequent legislation and the historical context from which the RLA arose. See *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976); *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612, 620 & n.5 (1967); *United States* v. *American Trucking Ass'n, Inc.*, 310 U.S. 534, 534-44 (1940). The court of appeals ignored these sources based on an apparent misplaced desire to demonstrate judicial restraint. In so doing, the court failed to fulfill its judicial function and, as a result, authorized "an end completely at variance with the purpose of the statute" and extended the union's right of picketing to limits never before recognized. *United States* v. *Public Utilities Comm'n of California*, 345 U.S. 295, 315 (1953). See *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 201-02 (1979); *Johansen* v. *United States*, 343 U.S. 427, 431 (1952); *International Longshoremen's & Warehousemen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237, 243 (1952); *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

The purposes underlying the RLA are clear; it is the duty of this Court to reason from those purposes and to declare definitively that Congress did not intend to allow unions such as BMWE free rein to effect stoppages of interstate commerce anywhere in the nation in support of a primary strike.[30]

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[30] As this Court observed in *United States* v. *Hutcheson*, 312 U.S. 219, 235 (1941), quoting from Justice Holmes' opinion for the circuit court in *Johnson* v. *United States*, 163 F. 30, 32 (1st Cir. 1908):

> "The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty

C. Congress Did Not Intend To Authorize Secondary Picketing In The RLA Because The Purpose Of Such Conduct Is To Induce Neutral Carriers To Violate Their Duties Under The Interstate Commerce Act.

As the court of appeals acknowledged, at least one of the purposes of BMWE's threatened secondary picketing of petitioners and other neutral carriers was to induce those railroads to cease handling shipments bound to or from MEC/PT so as to "dry up the Guilford lines' source of traffic" in an effort to force MEC/PT to accede to the union's demands. Pet. App. 5a. Thus, BMWE sought to pressure neutral railroads to stop interchanging traffic with MEC/PT[31] or handling interline freight also handled by the primary employers. It would be incongruous to hold that Congress, in enacting the RLA in 1926, intended to authorize such conduct when Congress had already made it unlawful for a carrier to refuse to handle interline freight tendered to it under the Interstate Commerce Act ("ICA").

The ICA requires railroads to provide "transportation or service on reasonable request," 49 U.S.C. § 11101(a), including interchange of freight with connecting lines, *id.* § 10742, and prohibits discrimination in the provision of service. *Id.* § 10741. In *Brotherhood of Railway & Steamship Clerks* v. *Florida East Coast Ry.*, 384 U.S. at 245, this Court emphasized the importance of the duties imposed by that Act:

> "The duty runs not to shippers alone but to the public. In our complex society, metropolitan areas in particular might suffer a calamity if rail service for freight or for passengers were stopped. Food and other critical supplies might be dangerously curtailed; vital services might be impaired; whole metropolitan communities might be paralyzed."

for the courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before."

[31] None of petitioners herein directly connects or interchanges traffic with MEC/PT. Pet. App. 32a-35a.

Accordingly, it has been held that a carrier may be liable in damages for a breach of its ICA duties, notwithstanding the existence of a labor dispute at the time. See *Ashley, Drew & N. Ry.* v. *United Transportation Union*, 625 F.2d at 1370 (and cases cited therein); *Lakefront Dock & Railroad Terminal Co.* v. *International Longshoremen's Ass'n*, 333 F.2d 549, 552 (6th Cir. 1962).

Just as struck primary carriers have a legal duty to try to continue to operate, as the *Florida East Coast* decision held, the ICA requires secondary carriers to continue to render service to struck carriers and shippers. See *Ashley, Drew, supra*, 625 F.2d at 1370; *Montgomery Ward & Co., Inc.* v. *Northern Pacific Terminal Co. of Oregon*, 128 F. Supp. 475, 494-95 (D. Or. 1953); *Toledo, A. A. & N. M. Ry.* v. *Pennsylvania Co.*, 54 F. 746 (N.D. Ohio), *app. dism'd sub. nom., In re Lennon*, 150 U.S. 393 (1893). It follows that union conduct, such as secondary picketing, that seeks to force a carrier to violate its statutory duties would also violate the ICA. See, e.g., *Ashley, Drew, supra*, 625 F.2d at 1370; *Brotherhood of Railroad Trainmen* v. *New York Cent. R.R.*, 246 F.2d 114, 120-21 (6th Cir. 1957); *Chicago & Ill. M. Ry.* v. *Brotherhood of Railroad Trainmen*, 315 F.2d 771, 774 (7th Cir.), *vacated as moot*, 375 U.S. 18 (1963).

In sum, Congress' manifest concern with the uninterrupted flow of interstate commerce further undercuts any suggestion that Congress could have implicitly intended in passing the RLA to permit the disruptive secondary activities threatened by BMWE here.

D. The RLA Should Be Construed Consistently With The National Labor Relations Act To Prohibit The BMWE's Threatened Secondary Picketing.

For the reasons stated, petitioners believe that the structure and purpose of the RLA (and the ICA) convincingly indicate that Congress did not intend to permit

secondary picketing by rail unions. But any doubt on that issue can be readily dispelled by reference to the national labor policy concerning secondary picketing embodied in the National Labor Relations Act, 29 U.S.C. 151 *et seq.*

This Court and others have previously held that, when the RLA does not clearly provide an answer to a railway labor problem, it is appropriate to turn "to the NLRA for assistance in construing the Railway Labor Act . . . ." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. at 383. See *Steele* v. *Louisville & N.R.R.*, 323 U.S. 192, 200-201 (1944) (exclusive representation and duty of fair representation); *Brotherhood of Railroad Trainmen Enterprise Lodge, No. 27* v. *Toledo, P&W R.R.*, 321 U.S. 50, 61 n.18 (1944) (good faith bargaining); *Robinson* v. *Pan American World Airways, Inc.*, 777 F.2d 84, 88 (2d Cir. 1985) ("Historically, courts and administrative agencies have looked to the NLRA and caselaw under it for guidance in interpreting questions arising under the RLA"). This is not to say that requirements in the NLRA should be imported wholesale into the RLA,[32] but it would be anomalous to permit union or employer activities under the RLA, which would clearly violate national labor policy as

[32] If anything, the differences in the two labor laws strongly support applying the ban on secondary picketing in the NLRA more broadly in cases arising under the RLA. As Judge Wisdom explained:

> "[T]he Railway Labor Act is more concerned than the National Labor Relations Act with continuance of the employer's operations and the employer-employee relationship. This is evidenced by the fact that while bargaining is the first and last step under the NLRA, it is only the first step under the Railway Labor Act . . . ."

United Industrial Workers of Seafarers International Union v. *Board of Trustees of Galveston Wharves*, 400 F.2d 320, 329-330 (5th Cir. 1968), *cert. denied*, 395 U.S. 905 (1969); *National Airlines, Inc.* v. *International Ass'n of Machinists and Aerospace Workers*, 416 F.2d 998, 1004 (5th Cir. 1969), *cert. denied*, 400 U.S. 992 (1971).

provided in other Acts. Accordingly, in analyzing the legality of a union's secondary activities under the RLA, it is appropriate for the Court to "refer to the NLRA's policies . . . to determine . . . whether [the union's conduct] is beyond the pale of any activity thought permissible." *Jacksonville Terminal Co.*, 394 U.S. at 384.

There is no question that Congress has emphatically condemned and outlawed secondary picketing such as that threatened by the BMWE in this case. A focal point of the Congressional debates that led to passage of the Taft-Hartley Act[33] was the uniform condemnation by senators and representatives of secondary picketing activities and secondary boycotts. Representative Landis' comments were typical:

> "No one should condone jurisdictional disputes, wildcat strikes, *secondary boycotts*, and violence and destruction of property . . . .
>
> "Secondary boycotts engaged in by labor unions to force a third party, not a party to a primary labor dispute, to force that party to cease using the products of the employer engaged in the primary dispute is an activity which should be made illegal. Secondary boycotts have had the effect of throwing a great many innocent people out of work. As a result of these secondary boycotts many of our citizens have been deprived of the deliveries of milk, bread, meat, fruits, vegetables, and other essentials of life." 93 Cong. Rec. A1296 (1947) (emphasis added).[34]

[33] Act of June 23, 1947, c. 120 § 1, 80th Cong., 1st Sess., 61 Stat. 136, codified at 29 U.S.C. §§ 141, *et seq.*

[34] Senator Taft, one of the Act's namesakes, spoke of the Senate Labor Committee's determination to outlaw the secondary boycott:

> "I think the committee all agreed that those types of strikes [*e.g.*, the secondary boycott] are in effect racketeering strikes. They are strikes which are not direct strikes to settle questions of wages or hours or better working conditions. They are strikes which are, in effect, attempts to bring indirect pres-

Consequently, in the Taft-Hartley Act, Congress amended the NLRA to include Section 8(b)(4), 29 U.S.C. § 158 (b)(4), making most secondary picketing by industrial unions an unfair labor practice.

Congress' purpose in passing Taft-Hartley was clear: to declare as national labor policy the illegality of secondary picketing and the secondary boycott as labor weapons.[35] As this Court explained in *Local 1976, United Brotherhood of Carpenters and Joiners* v. *NLRB*, 357 U.S. 93, 100 (1958):

> "[Congress] aimed to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread, and, as Congress evidently judged, dangerous practice of unions to widen that conflict: the coercion of neutral employers, themselves not concerned with a primary labor dispute, through the inducement of their employees

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> sure on third parties, to get third parties to work in some way to bring about a result which may ultimately be favorable to the one initiating the pressure, which has no direct relation to the work except perhaps with regard to the question of power." 93d Cong., Rec. 3954 (1947).

Senator Taft described the breadth of the prohibition under consideration:

> "It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice." 93 Cong. Rec. 4323 (1947).

[35] Section 8(b)(4) of the NLRA, as added by Taft-Hartley, is not directly applicable to secondary activities of rail labor unions. Section 8(b)(4) prohibits secondary activities only of a "labor organization," which is defined in Section 2(5) of the Act as an organization of "employees." "Employee" is defined in section 2(3) of the Act as excluding "any individual employed by an employer subject to the Railway Labor Act." NLRA § 2(5), (3); 29 U.S.C. § 152(5), (3).

> to engage in strikes or concerted refusals to handle goods."

Thus, picketing around the site of a secondary employer's business solely for the purpose of inducing it to cease doing business with the primary employer is plainly illegal secondary activity under Section 8(b)(4). See, e.g., *Local 761, International Union of Electrical, Radio & Machine Workers* v. *NLRB*, 366 U.S. 667, 675 (1961); *Wadsworth Building Co.*, 81 N.L.R.B. 802, 805.

In 1959, Congress further tightened its prohibition of secondary activities by amending the NLRA. Congress at that time resolved the issue of whether Section 8(b)(4) as enacted in 1947 expressly prohibited such secondary picketing of *rail* employers by *non-rail* unions in furtherance of their primary disputes with *non-rail* employers. Because Section 8(b)(4) as enacted in Taft-Hartley outlawed only secondary pressures directed against "any employer," defined to exclude "any person subject to the Railway Labor Act,"[36] a split of authority had developed concerning the lawfulness of such secondary picketing under the NLRA.[37] Congress resolved this dispute by further amending the NLRA in the Labor-Management Reporting and Disclosure Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (Landrum-Griffin Act[38] to make it unlawful for an NRLA union to engage in secondary activities against "any *individual* employed by any *person* engaged in commerce or in an industry affecing commerce." 29 U.S.C. § 158(m)(4) (emphasis added). One of the express reasons for this change was to reaffirm Congress' intent that the nation's railroads be free from the fear of secondary pressures

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[36] NLRA Section 2(2); 29 U.S.C. § 152(2).

[37] *See, e.g., Int'l Rice Milling Co., Inc.* v. *NLRB*, 183 F.2d 21, 24-25 (5th Cir. 1950), *rev'd in part on other grounds*, 341 U.S. 665 (1951).

[38] Act of September 14, 1959, Pub. L. No. 86-257, 86th Cong., 1st Sess., 73 Stat. 519.

from *any* source. See *United Steelworkers* v. *NLRB*, 376 U.S. 492, 501 (1964).

The legislative history of Landrum-Griffin is replete with references to the desire of President Eisenhower and the Congress to stamp out once and for all secondary pressure tactics.[39] Congress viewed the LMRDA as effectuating its intent in passing Taft-Hartley twelve years earlier:

> "We all know that Congress intended to outlaw secondary boycotts in 1947. For a variety of reasons the attempt was not successful." Remarks of Senator Curtis, 105 Cong. Rec. 16423 (1959); II LMRDA Legislative History at 1441.

In fact, in condemning the use of secondary picketing directed *at* the nation's railroads, Congress confirmed that the use of such secondary tactics *by* rail union members was equally contrary to national labor policy. S. Rep. No. 187, 86th Cong., 1st Sess. 78, 80 (1959); I LMRDA Legislative History at 476. Congress' vehement condemnation of the use of secondary pressures by industrial unions directed against all industries, *including rail transportation*, demonstrates clearly that national labor policy forbids secondary picketing.

For the foregoing reasons, the issue in this case cannot and should not be isolated from the totality of national labor laws and policy, of whose overall fabric the RLA is an inseparable part. Thus, even if the RLA itself does not supply a complete answer to the issue of the legality of BMWE's activities, Congress' intent to prohibit BMWE's secondary picketing could not be clearer.

[39] President Eisenhower's January 28, 1959 Message to Congress on Proposed Labor-Management Legislation called on Congress to enact legislation "[t]o protect the public and innocent third parties from unfair and coercive practices, such as boycotting and blackmail picketing." S. Doc. No. 10, 86th Cong., 1st Sess. at 1 (1959), *reprinted in* I National Labor Relations Board, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 80 (1959) (hereinafter referred to as "LMRDA Legislative History"). *See also* S. Rep. No. 187, 86th Cong., 1st Sess., at 78 (1959); LMRDA Legislative History at 474 (statement of Sen. Kennedy); 105 Cong. Rec. 14195 (1959); II LMRDA Legislative History at 1568 (remarks of Rep. Griffin).

E. Nothing In *Jacksonville Terminal* Requires The Court To Hold That Purely Secondary Picketing Is Lawful Under The RLA.

The court of appeals based its conclusion that the RLA does not prohibit secondary picketing largely on this Court's decision in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, *supra*. Pet. App. 15a-17a.[40] A proper reading of that decision demonstrates that the Court carefully avoided ruling on the legality of secondary picketing under the RLA because such a ruling was not necessary to resolve the narrow issue before the Court: *viz*, should state courts be permitted to apply

[40] *Jacksonville Terminal* was not the first case to bring to this Court the issue of secondary picketing by rail unions of rail carriers. Three years earlier, this Court reviewed the Fifth Circuit's decision in *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir. 1966). At issue there was the power of a federal court under Norris-LaGuardia to enjoin picketing of the Jacksonville Terminal Company by employees of the struck Florida East Coast Railway ("FEC"). FEC was a one-fourth owner of Jacksonville Terminal Company and that Company provided services to FEC that were found by the Fifth Circuit to be "an integral part of the day-to-day operations of the FEC." 362 F.2d at 651. A divided court of appeals held that the union's picketing could not be enjoined. 362 F.2d at 654-655.

The Fifth Circuit's judgment was affirmed by an equally divided Supreme Court. 385 U.S. 20 (1966). Thus, four of the eight voting Justices would have reversed the court of appeals' judgment and would have granted an injunction against the picketing of a carrier whose position was closely related to the primary disputant, FEC. The close division of opinion on that issue explains the equivocal manner in which the Court in *Jacksonville Terminal* treated the RLA issue in deciding the narrow pre-emption question presented there.

state law in prohibiting self-help activities by rail labor unions.[41]

In *Jacksonville Terminal*, this Court reviewed the decision of the Florida District Court of Appeal, which had enjoined a union's picketing of Jacksonville Terminal Company under the state's restraint of trade and transportation laws. In a 4-3 decision, this Court vacated the Florida court's injunction on the ground that federal law preempted the state court's application of state law to determine the legality of the picketing. *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969).

This Court was careful to point out the peculiar facts presented to it. Thus, early in the opinion the Court noted that the picketing was not of a truly neutral employer:

> "Petitioners, who represent FEC's operating employees, responded by calling a strike and thereafter by picketing the various locations at which *FEC* carried on *its* operations, including the premises of the respondent, Jacksonville Terminal Company." 394 U.S. at 371 (emphasis added).

The Court observed that FEC carried on "substantial daily operations at the terminal" and that the Terminal Company provided "various services necessary to FEC's operations." *Id.* at 373. It expressly adopted the finding of the Fifth Circuit in *Atlantic Coast Line* that "'the facilities and services provided by the Terminal Company *in fact* constitute an integral part of the day-to-day operations of the FEC . . . .'" *Ibid.* (emphasis in original). This Court recognized that the case involved picketing at a "common situs." *Id.* at 388-389.

The Court carefully defined the narrow issue presented to it. "We are presented . . . with the problem of de-

[41] As this Court explained, "We granted certiorari . . . to determine the extent of *state* power to regulate the economic combat of parties subject to the Railway Labor Act." 394 U.S. at 372 (emphasis added).

lineating the area of labor combat protected against infringement *by the States*." *Id.* at 382 (emphasis added). In determining whether the union's picketing activities could be regulated by the states, it was necessary "only to determine whether [the union's conduct] is within the general penumbra of conduct held protected under the Act or whether it is beyond the pale of any activity thought permissible." *Id.* at 384.[42] Thus, there was no occasion to determine whether the union's picketing of Jacksonville Terminal was in fact permissible as a matter of federal labor law but only whether the conduct was "protected" from state regulation. *Id.* at 382 n.17.[43]

On that issue, the Court said:

> "We have thus far concluded that although the Florida courts are not pre-empted of jurisdiction over this cause . . . , the issues therein are governed by federal law . . .; that the Railway Labor Act permits railway employees to engage in *some* forms of self-help, free from state interference . . .; and, drawing upon labor policies evinced by the National

[42] The court of appeals ignored this language and concluded instead that this Court had "inquired directly whether secondary picketing is a lawful method of self-help, one Congress meant to leave unregulated, and held that it is." Pet. App. A 16a. The court of appeals reached this conclusion based on its belief that this Court had found NLRA preemption principles "unhelpful." *Ibid.* In fact, however, this Court recognized the NLRA to be the "relevant corpus of 'national labor policy,'" noted that it had frequently referred to the NLRA for assistance in interpreting the RLA and expressly declared that it was doing so again. 394 U.S. at 383.

[43] In "mapping out the very general boundaries of self-help under the Railway Labor Act" (*Jacksonville Terminal*, 394 U.S. at 391), the Court noted that the "common situs" activity presented in that case might well have been permissible under NLRA standards. *Id.* at 389-390. Thus, the Court apparently was influenced by the possible legitimacy of the picketing before it under NLRA principles. The purely secondary nature of the picketing in the present case contrasts starkly with the facts in *Jacksonville Terminal*; the picketing here plainly would be unlawful under the standards in the NLRA. See pp. 29-35, *supra*.

> Labor Relations Act . . . that such protected self-help includes peaceful 'primary' strikes and nonviolent picketing in support thereof . . . and that it cannot categorically be said that *all* picketing carrying 'secondary' implications is prohibited . . . ." *Id.* at 390 (emphasis in original).[44]

Because no definitive conclusion could be drawn from the RLA on the preemption issue presented, the Court was careful to mold its holding to the specific context of the case before it:

> "Hence, until Congress acts, picketing—whether characterized as primary or secondary—must be deemed conduct protected against *state* proscription." *Id.* at 392-393 (emphasis added).

Thus, the teaching of the *Jacksonville Terminal* decision is not, as the court of appeals concluded, that all secondary picketing is lawful under the RLA.[45] It had no reason to decide that issue in order to dispose of the preemption issue. Nor is it necessary for the Court in this case to mark the outer bounds of prohibited secondary conduct under the RLA. In contrast to the facts in *Jacksonville Terminal*, petitioners carry on no joint operations and maintain no joint facilities with MEC/PT. Thus, there would have been no "common situs" picketing and, as the district court found, no petitioner had "substantially aligned" itself with or become an "ally" of MEC/PT by providing any form of extraordinary aid or assistance which might have converted its status from that of a neutral secondary carrier to that of a primary disputant with BMWE. Pet. App. 32a-36a. Consequently, this case presents the Court with both the opportunity and the obligation to hold on the basis of the policy and structure of the RLA, as influenced by the standards of the ICA and NLRA, that Congress did not intend in enacting the RLA to authorize pure secondary picketing by a rail union.

[44] Indeed, if this Court had concluded that Congress intended rail unions to be permitted as a matter of federal law to engage in purely secondary picketing, it surely would have said so, thus significantly truncating its discussion of the preemption issue.

[45] Several subsequent federal court decisions have rejected the argument that *Jacksonville Terminal* held purely secondary conduct to be lawful under the RLA. *See, e.g., Marriott In-Flite Services* v. *Local 504, Air Transport Div.*, 557 F.2d 295, 297 n.4 (2d Cir. 1977); *In re Brotherhood of Ry., Airline & Steamship Clerks*, 605 F.2d 1073, 1075 (8th Cir. 1979); *Terminal R. Ass'n of St. Louis* v. *Brotherhood of Ry., Airline and Steamship Clerks*, 458 F. Supp. 100, 103 (E.D. Mo. 1978) ("The Supreme Court [in *Jacksonville Terminal*] did not say that all secondary activity by railroad unions against railroad employers is legal").

II. THE NORRIS-LaGUARDIA ACT DOES NOT PROHIBIT A FEDERAL COURT FROM ENJOINING SECONDARY PICKETING OF RAILROADS THAT VIOLATE THE RAILWAY LABOR ACT.

A. Notwithstanding Its Broad Language, Congress Did Not Intend The Full Sweep Of The Norris-LaGuardia Act To Apply To Cases Arising Under The RLA.

In 1932, Congress passed the Norris-LaGuardia Act[46] to limit the authority of federal courts to enjoin specified labor union activities in cases involving or growing out of a labor dispute. The language of the Act is broad—"[n]o court of the United States . . . shall have jurisdiction to issue any . . . injunction in a case involving or growing out of a labor dispute . . ." But this Court has routinely declined to give it an unyielding sweep in cases arising out of the Railway Labor Act. See, e.g., *Chicago & N.W. Ry.* v. *United Transportation Union*, 402 U.S. 570 (1971). See also pages 42-45, *infra*. These decisions reflect the concern during the Norris-LaGuardia Act debates that its scope might prevent the federal courts from enjoining strike activities in the rail industry that would prevent the railroads from performing their common law and statutory duties or that would violate the RLA.

[46] Act of March 23, 1932, c. 90, 72d Cong. 1st Sess., 47 Stat. 70, 29 U.S.C. §§ 101-115.

Representative Beck argued against the bill, contending that, if it had been law at the time of *United States* v. *Debs*, 64 F. 724 (N.D. Ill. 1894) *pet. for writ of habeus corpus denied sub nom. In re Debs*, 158 U.S. 564 (1895), it would have prevented the issuance of the injunction in that case that prohibited a secondary boycott of the Pullman Company. Congressman Beck thought that depriving the courts of power to enjoin such conduct under the proposed legislation, as he understood it, would allow "the railroad brotherhoods . . . to tie up every railroad in the United States" over a wage dispute. 75 Cong. Rec. 5472, 5476, 5500 (1932). He therefore proposed an amendment that would have provided that courts would still be free to restrain "the obstruction of any instrumentality of interstate or foreign commerce, as railroad[s] . . . ." *Id.* at 5474.

Representative LaGuardia, the Act's namesake, insisted that the proposed amendment was "not at all necessary." 75 Cong. Rec. 5504. He explained why in response to questions by Representative Lankford. Lankford stated that "[w]e do not want to see any condition arise [such as the *Debs* strike] where the public utilities are put out of business or ruined and the public is made to suffer" and asked whether the bill would "make it possible for lack of an injunction to tie up railroads and prevent them from transporting milk, for instance?" *Id.* at 5499. LaGuardia answered: "[T]he railroad labor act . . . *takes care of the whole labor situation pertaining to the railroads. They could not possibly come under this* for the reason that we provided the machinery there for settling labor disputes." *Ibid.* (emphasis added). Mr. Lankford persisted: "It [the bill] does not apply to the transportation of . . . necessities that go in interstate commerce?" Mr. LaGuardia replied: "Interstate traffic is *entirely covered* in the railroad labor act of 1926." *Ibid.* (emphasis added).[47] Following LaGuardia's explanation that the RLA already took "care of the whole labor situation pertaining to the railroad" and that the amendment therefore was unnecessary, the proposed amendment was defeated.

[47] Representative LaGuardia chided Representative Beck for raising groundless fears based "entirely on the interruption of transportation of interstate traffic when there is another law [the RLA] which will take care of that situation. Gentlemen, this bill does not—and I cannot repeat it too many times—this bill does not prevent the court from restraining any unlawful act." 75 Cong. Rec. 5478.

The proceedings in the Senate were likewise irreconcilable with the court of appeals' holding that no injunction can be issued in a Railway Labor Act case. On the floor, the question was raised whether the bill would legislatively overrule *Texas & N.O. R.R.* v. *Brotherhood of Railway & Steamship Clerks*, *supra*, under which violations of § 2 Third of the Railway Labor Act could be enjoined. 75 Cong. Rec. at 4936 (remarks of Sen. Steiwer).[48] Senator Blaine stated that it would not, because the Railway Labor Act confers "certain rights under substantive laws," and the proposed legislation could not be construed to abridge rights under "any substantive law, . . . certainly not with respect to the substantive law written into the railway labor act." *Id.* at 4937-38. The Senate Report recognized that "injunctive relief is often the only adequate and effective relief against any wrongs and to prevent many irreparable injuries in controversies of infinite variety," and stated that "[i]t is not sought by this bill to take away from the judicial power any jurisdiction to restrain by injunctive process, unlawful acts or acts of fraud or violence." S. Rep. No. 163, 72d Cong., 1st Sess. 11 (1932).

Thus, the legislative history of the Norris-LaGuardia Act indicates strongly that injunctive relief would remain available to remedy violations of the RLA, such as the

[48] Section 2 Third provided, at the time in question, that "[r]epresentatives, for the purposes of this Act, shall be designated by the respective parties . . . without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other." *See* 281 U.S. at 557-58.

BMWE's pure secondary picketing. Senator Blaine and Representative LaGuardia, sponsors of the legislation in their respective Houses, assured their colleagues that the bill would not lead to an expansion of railroad strikes, such as that approved by the decision below. See generally *Brotherhood of Railroad Trainmen, Enterprise Lodge, No. 27* v. *Toledo, P. & W. R.R.*, 321 U.S. 50 (1944).[49]

B. This Court Has Held That The Norris-LaGuardia Act Ban On Injunctions Must Accommodate The Purposes Of The RLA.

Consistent with this history, this Court has established in a long series of decisions that the literal terms of Norris-LaGuardia must give way to the underlying policies of the RLA and that an injunction may issue to enjoin conduct found to be contrary to the RLA's purposes. "We have held that the [Norris-LaGuardia] Act does not deprive the federal courts of jurisdiction to enjoin compliance with various mandates of the Railway Labor Act." *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 772 (1961).[50]

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[49] As this Court recognized in *Toledo, P. & W. R.R.*, "The [Norris-LaGuardia Act] did not entirely abolish judicial power to impose previous restraint in labor controversies." 321 U.S. at 58.

[50] In *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515, 563 (1937), decided shortly after the passage of Norris-LaGuardia, this Court, in ordering the railroad to recognize and bargain with a union certified by the National Mediation Board, found that Norris-LaGuardia did not "render nugatory" the provisions of the RLA. Similarly, in *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232, 237 (1949), the Court found that Norris-LaGuardia did not bar an injunction against a union's enforcement of racially discriminatory collective bargaining agreements that were inconsistent with the mandates of the RLA first discerned by the Court five years earlier in its seminal decision in *Steele* v. *Louisville & N. R.R.*, 323 U.S. 192 (1944). *See also Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774 (1952).

The RLA was amended in 1934, two years after Norris-LaGuardia's passage, and at that time Congress added an express provision setting out the purposes of the Act. As a result, this Court has ruled that, in the event of a conflict between the policies of the two statutes, the RLA should prevail "under familiar principles of statutory construction." *Chicago & N. W. Ry.* v. *United Transportation Union*, 402 U.S. at 582 n.18. *See also Virginian, Ry.*, 300 U.S. at 563.

In *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R.R.*, 353 U.S. 30 (1957), the Court enjoined the union from striking over minor disputes that were pending before the National Adjustment Board, *despite the absence of an express prohibition of such self-help in the Act*, because to have permitted such conduct would have been inconsistent with the basic purpose of the Act:

> "We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the *obvious purpose* in the enactment of each is preserved. We think that the *purposes* of these Acts are reconcilable." 353 U.S. at 40 (emphasis added).

See *Brotherhood of Locomotive Engineers* v. *Louisville & N.R.R.*, 373 U.S. 33 (1963).

Most recently, in *Chicago & N.W. Ry.* v. *United Transportation Union*, 402 U.S. 570 (1971), this Court approved the use of an injunction to enforce the general obligation contained in Section 2 First of the RLA, 45 U.S.C. § 152 First, that both management and labor "exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . in order to avoid any interruption to commerce." This Court had previously characterized the duty reflected in Section 2 First as "the heart of the Railway Labor Act" in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. at 377-378. Based on the evident purpose of Congress in creating this obligation, this Court concluded that Norris-LaGuardia would not stand in the way:

> "If we have misinterpreted the congressional purpose, Congress can remedy the situation by speaking more clearly. In the meantime we have no choice but to trace out as best we may the uncertain line of appropriate accommodation of two statutes with purposes that lead in opposing directions." 402 U.S. at 582.

Thus, this Court approved the use of an injunction "when such a remedy is the only practical, effective means of enforcing" the duties and obligations emanating from the RLA. 402 U.S. at 583.[51]

These decisions and others of this Court in the labor arena [52] compel the conclusion that the court of appeals erred when it found that the district court was powerless, as a result of Norris-LaGuardia, to enjoin BMWE's secondary picketing, even if such conduct violated the RLA. Pet. App. 17a-19a.[53] BMWE's duty to refrain from

[51] The Supreme Court's decision in *Order of Railroad Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330 (1960), relied on by BMWE in the court of appeals, supports the petitioners' position here because the union's conduct in that case, "far from violating the Railway Labor Act . . . was in obedience to the Act's command." 362 U.S. at 339. The secondary picketing threatened here, in contrast, is totally inconsistent with the purposes and policies of the RLA.

[52] *See, e.g., Boys Markets, Inc.* v. *Retail Clerk's Union, Local 770*, 398 U.S. 235, 249-253 (1970); *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 458-459 (1957). *See also Jacksonville Bulk Terminals, Inc.* v. *International Longshoremen's Ass'n*, 457 U.S. 702, 708 (1982).

[53] The court of appeals erroneously interpreted *Chicago R. & I. R.R.* and *Toledo, P. & W. R.R.* as holding that an injunction is available to enjoin strikes while RLA processes are continuing, but that Norris-LaGuardia forbids resort to injunctions once these processes have been exhausted. Pet. App. 19a. Nothing in either decision supports such a distinction. If this Court finds that Congress intended to outlaw secondary picketing by rail unions, such as the BMWE's actions, then the prior decisions of this Court discussed above compel the conclusion that the Norris-LaGuardia Act does not prohibit effective injunctive relief.

spreading its primary dispute with MEC/PT through the picketing of purely secondary rail carriers such as petitioners emanates from the RLA and can only be enforced effectively through the issuance of an injunction in view of the irreparable injury that both the carriers and the public would suffer if such a disruption of interstate commerce were permitted to occur.

III. UNLESS THE TARGET OF PICKETING IS "SUBSTANTIALLY ALIGNED" WITH THE STRUCK RAILROAD, A SUIT TO ENJOIN SECONDARY PICKETING DOES NOT "INVOLVE OR GROW OUT OF A LABOR DISPUTE" WITHIN THE MEANING OF THE NORRIS-LAGUARDIA ACT.

There is an additional reason, based on the text of the Norris-LaGuardia Act itself, why the district court had jurisdiction to enjoin the BMWE's picketing. Very simply, this case is not one "involving or growing out of a labor dispute" within the meaning of Section 4 of the Norris-LaGuardia Act.

Section 4(a) of Norris-LaGuardia divests the federal courts of their injunctive powers only in cases "involving or growing out of" a "labor dispute." 29 U.S.C. § 104. A "labor dispute" is a "controversy concerning terms or conditions of employment, or concerning . . . representation . . . ." *Id.* § 113(c). "A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry," or under certain other circumstances not relevant here. *Id.* § 113(a).

Section 13(a) must be read with Section 13(c) and in light of the statute's purpose. The case—*i.e.*, the suit for an injunction—must "involve or grow out of" a "controversy concerning terms or conditions of employment, or concerning . . . representation." In suits like this one to restrain secondary picketing, the case "involves or grows out of" the picketing, which is *not* a controversy concerning representation or terms or conditions of employment. The question of statutory construction that

must be resolved is whether, nevertheless, the case should be held to be one "involving or growing out of" the primary labor dispute on the ground that the injunction suit is part of a chain of events that began with, and would not have come about *but for*, the primary labor dispute.[54]

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[54] It is clear that there is no "labor dispute" between the BMWE and petitioners since the controversy between them does not concern either the representation of petitioners' employees or their terms or conditions of employment. *See Ashly, Drew, supra,* 625 F.2d at 1362. To be sure, Section 13(c) defines the term "labor dispute" without regard to "whether or not the disputants stand in the proximate relation of employer and employee." But this language cannot be understood without reference to the legislative history of the provision. Congress passed the Norris-LaGuardia Act to overrule a series of this Court's cases which had excluded unions and their activities from the protections of Section 20 of the Clayton Act because unions were not deemed to be "employees." *See, e.g., United States* v. *Hutcheson,* 312 U.S. 219, 229-30 (1941); *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters Ass'n,* 274 U.S. 37 (1927); *Duplex Printing Press Co.* v. *Deering,* 254 U.S. 443 (1921). Justice Brandeis dissented from this interpretation of § 20 because it ignored the interest of unions in organizing employees. *See, e.g., Duplex Printing,* 254 U.S. at 497, 480-83 (Brandeis, J., dissenting). *See also Ashley, Drew,* 625 F.2d at 1366; *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R.,* 362 F.2d at 653 n.2.

Congress enacted the Norris-LaGuardia Act "expressly to overrule the majority opinion of *Duplex* and the cases that followed it and to affirm the philosophy of the dissenters in those cases." *Local Union No. 189 Amalgamated Meat Cutters & Butcher Workmen* v. *Jewel Tea Co. Inc.,* 381 U.S. 676, 703 (1965) (Goldberg, J., concurring). Thus, Congress "established that the allowable area of union activity was not to be restricted, as it had been in the *Duplex* case, to an immediate employer-employee relation." *United States* v. *Hutcheson,* 312 U.S. at 231. *See* H.R. Rep. No. 669, 72d Cong., 1st Sess. 7-8 (1932); *F. Frankfurter & N. Greene, The Labor Injunction* 165-76, 216 (1930); C. Gregory, *Labor and the Law* 193-94 (2d ed. 1958).

As the House report makes clear, Congress intended by the definitions in Section 13 merely to establish in the organizational arena that the Act "is broad enough to include others than the immediate disputants and thereby correct[] the law as announced in the case of *Duplex Printing Co.* v. *Deering. . . .*" H.R. Rep. No. 669, 72d Cong., 1st Sess. 10 (1932). Section 13 must be construed in light of this purpose.

In the context of secondary picketing of railroads, the courts (until the instant controversy) have consistently held that a relationship of a particular sort—called "substantial alignment"—must exist between the picketed (secondary) carrier and the struck (primary) carrier before a union can picket the secondary carrier. Perhaps because a different interpretation of Section 13 in the railroad context would lead to a result so clearly contrary to Congress' intent, those courts (including the Fifth and Eighth Circuits) have held, in essence, that Section 4 of the Norris-LaGuardia Act does not apply at all in cases involving picketing of neutral railroads—*i.e.*, railroads that are not "substantially aligned" with the struck carrier. See *Ashley, Drew,* 625 F.2d at 1363 (and cases cited therein).[55]

The substantial alignment test is consistent with the language of Section 4, and harmonizes that Section with overall national labor and interstate commerce law and policy. Interpretation of the governing language requires that the courts determine the point at which any

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[55] The Eighth Circuit in *Ashley, Drew* followed a long line of railway labor cases based on this principle. *See Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R.,* 362 F.2d 649 (5th Cir.), *aff'd by an equally divided Court,* 385 U.S. 20 (1966); *Consolidated Rail Corp.* v. *BRAC,* 84 Lab. Cas. (CCH) ¶ 10,924 (W.D.N.Y. 1978), *app. dismissed,* 595 F.2d 1208 (2d Cir. 1979); *Southern Ry.* v. *BRAC,* 458 F. Supp. 1189 (D.S.C. 1978); *Alton & Southern Ry.* v. *BRAC,* 84 Lab. Cas. (CCH) ¶ 10,835 (D.D.C.), *aff'd mem.* (D.C. Cir., Sept. 15, 1978), *cert. denied,* 439 U.S. 996 (1978); *Terminal Railroad Ass'n* v. *BRAC,* 458 F. Supp. 100 (E.D. Mo. 1978); *Western Maryland R.R.* v. *System Board of Adjustment,* 465 F. Supp. 963 (D. Md. 1979); *Chicago Transp. Co.* v. *BRAC,* 99 L.R.R.M. 3072 (N.D. Ill. 1978).

given activity is so remotely or tangentially related to the labor dispute that it cannot be said to "involve or grow out of" that dispute. It is a dividing line that must be drawn, and the courts must draw it. The *Ashley, Drew* "substantial alignment" test is appropriate for that purpose because it is not only consistent with the language of Norris-LaGuardia, it also accommodates the language and policies of Norris-LaGuardia with the broader policies of the Railway Labor Act and the Interstate Commerce Act.

The "substantial alignment" doctrine—like the analogous "ally" doctrine under the NLRA, see *Ashley, Drew*, 625 F.2d at 1367—is a judicial tool designed to "preserv[e] the right of labor organizations to bring pressure to bear on [primary] employers . . . [while] shielding unoffending employers and others from pressures in controversies not their own." *NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951). It thus is a rule of necessity developed to preserve labor's right of picketing, and not, as the court of appeals states, a means of limiting that right. The doctrine allows the extension of picketing beyond the original dispute when the action of a secondary employer that is otherwise immune from picketing makes it essential that the union be entitled to self-help against the secondary employer. Put simply, a secondary employer is substantially aligned with a primary employer—and therefore subject to strikes or picketing—only if the secondary employer has "joined the fray" and thus, in effect, has assumed a role in the primary dispute.

Thus, "substantial alignment" exists if the struck carrier receives services from the secondary carrier that "*in fact* constitute an integral part of [the struck railroad's] day-to-day operations." *Atlantic Coast Line*, 362 F.2d at 651, *quoted in Ashley, Drew*, 625 F.2d at 1364 (emphasis in original). By the same token, "[m]utual participation in a strike insurance plan has been held to be a strong indication of substantial alignment." *Id.* at

1364 n.8 (citing *Southern Ry.* v. *BRAC*, 458 F. Supp. 1189, 1191-92 (D.S.C. 1978); *Alton & Southern Ry.* v. *BRAC*, 84 Lab. Cas. (CCH) ¶ 10,835, at 19,256-57 (D.D.C.), *aff'd mem.* (D.C. Cir., Sept. 15, 1978) *cert. denied*, 439 U.S. 996 (1978). Without indications of a "significant commonality of interest" between the struck and non-struck carriers, however, an injunction suit by the secondary employer is not a case involving or growing out of the original labor dispute for purposes of the Norris-LaGuardia Act.

The substantial alignment doctrine as applied here also properly protects the interests embodied in the Interstate Commerce Act. See *Ashley, Drew*, 625 F.2d at 1369. Under the ICA, petitioners have a "federal right to relief from unprivileged interference with the performance of . . . duties" to provide safe and adequate transportation service. *Id.* at 1370. Whether a union's activity is privileged can be decided on the basis of the relationship between the primary and secondary employer. A wholly innocent railroad—one that is not substantially aligned with the primary carrier—should be permitted to enforce by appropriate equitable relief its right to be free of interference in the performance of its federal statutory duties. Here the union's action was clearly not privileged; no one can seriously argue that the RLA *endorses* respondents' picketing. Accordingly, the substantial alignment test reasonably accommodates Norris-LaGuardia not only with the dictates of the RLA, but also those of the ICA.

As we have already discussed, the record in this case is devoid of facts that could support a holding that any petitioner has made itself a primary disputant in the dispute between the BMWE and the Maine Central. The undisputed facts of this case plainly establish that petitioners are not aligned with the Maine Central in any relevant way. Accordingly, Norris-LaGuardia should be no bar to an injunction against the secondary activities against petitioners threatened by BMWE.

CONCLUSION

The judgment of the court of appeals should be reversed.

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[illegible] United States

[illegible] Term, 1986

[illegible] Railroad Company; Union Pacific Railroad Company; Missouri Pacific Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; Baltimore and Ohio Railroad Company; Baltimore and Ohio Chicago Terminal Company; Chesapeake and Ohio Railway Company; and CSX Transportation, Inc.,

Petitioners,

v.

Brotherhood of Maintenance of Way Employes, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTIONS PRESENTED

1. Does Section 4 of the Norris-LaGuardia Act (29 U.S.C. § 104) withdraw jurisdiction from the Federal Courts to enjoin a rail union engaged in a lawful strike from peacefully picketing railroads which are neutral to the dispute?

2. Do the Railway Labor Act (45 U.S.C. § 151, *et seq.*) and Section 20 of the Clayton Anti-Trust Act (29 U.S.C. § 52), as reasserted by the Norris-LaGuardia Act, immunize peaceful secondary picketing by a rail labor organization from being "violations of any law of the United States"?

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BRIEF FOR RESPONDENTS

Respondents Brotherhood of Maintenance of Way Employes ("BMWE") and several of its officers respectfully request that this Court affirm the judgment of the United States Court of Appeals for the Seventh Circuit in *Burlington Northern R.R. v. BMWE*, 793 F.2d 795 (7th Cir. 1986).

STATUTES INVOLVED

Respondents respectfully submit that this case involves the proper interpretation of Sections 4 and 13 of the Norris-LaGuardia Act, 29 U.S.C. §§ 104 and 113, as reasserting Section 20 of the Clayton Anti-Trust Act, 29 U.S.C. § 52, and whether those Acts are to be accommodated to the Railway Labor Act, 45 U.S.C. § 151, *et seq.*[1]

COUNTERSTATEMENT OF THE CASE

The Maine Central Railroad ("MEC") and Portland Terminal Company ("PT") are the primary rail carriers in the state of Maine, while the MEC also operates in New Hampshire and Vermont. PT is a wholly-owned subsidiary of MEC and MEC, in turn, is a subsidiary of Guilford Transportation Industries, Inc. After acquiring control of the MEC and PT in June 1981, Guilford obtained approval from the Interstate Commerce Commission in 1982 to acquire control over the Boston and Maine Corporation ("B&M")[2] and, later in that same year, it obtained Commission approval to acquire control over the Delaware & Hudson Railway Company ("D&H").[3] By early 1984, Guilford had exercised the authority

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[1] Respondents have reproduced as Appendix A to this Brief Section 20 of the Clayton Act and Sections 4 and 13 of the Norris-LaGuardia Act; Appendix B hereto is a side-by-side comparison of the second paragraph of Section 20 of the Clayton Act with Section 4 of the Norris-LaGuardia Act.

[2] *Guilford Transportation Industries, Inc.—Control—B&M*, 366 I.C.C. 292 (1982).

[3] *Guilford Transportation Industries, Inc.—Control—D&H*, 366 I.C.C. 396 (1982)

of J. R. Davis at Ex. A. Independently of the first approach, respondent BMWE began to picket carriers which connected with the Guilford system (*e.g.*, *Richmond, Fredericksburg & Potomac R.R. v. BMWE* [hereinafter, "*RF&P* case"], 795 F.2d 1161 (4th Cir. 1986), *pet. for cert. pending*, Sup. Ct. No. 86-503) and planned for the picketing of strategic locations through which Guilford's traffic flowed, such as Chicago. J.A. at 52-53, 54-55. Contrary to petitioners' statements in their brief (Pet. Brief at 19), respondent BMWE neither asked, nor gave petitioners an option to boycott Guilford in exchange for freedom from picketing. *See*, J.A. at 38-39, 52-53.

A. Petitioners' Responses To The BMWE's Threatened Picketing

Petitioner BN was the first carrier to respond to respondent BMWE's threat to picket mutual aid carriers and on April 9, 1986, it filed a complaint in the United States District Court for the Northern District of Illinois against the Brotherhood and several of its officers; on that same day it obtained an *ex parte* restraining order enjoining respondents from picketing or striking. J. A. at 1. Encouraged by the BN's success in comparison with their own lack of success before the district court in the District of Columbia, petitioners Missouri Pacific Railroad ("MP") and Union Pacific Railroad ("UP") filed a new complaint against respondents in Chicago on April 10 and requested a restraining order.[7]

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tution of the United States to engage in secondary picketing. *BMWE v. Association of American Railroads, et al.*, D.D.C. Civil Action No. 86-0951. Sixty-two railroads, including all petitioners but the Burlington Northern ("BN") filed a separate action against respondent on April 9 (*Alton & Southern Ry. v. BMWE*, D.D.C. Civil Action No. 96-0977) and sought a restraining order to prohibit respondent from engaging in such picketing. That restraining order was denied without prejudice on April 10, 1986, and the non-BN petitioners thereafter filed three separate actions against respondent in the Northern District of Illinois on April 10 and 11, 1986. *See*, *BMWE v. BN*, Sup. Ct. No. 85-1852, Pet. at 5-8.

[7] Petitioner UP filed a notice of dismissal from *Alton & Southern Ry. v. BMWE*, *supra* note 6, on April 11, 1986, under Rule 41(a),

They were joined by the Atchison, Topeka & Santa Fe Railway ("ATSF") which also filed a new complaint on April 10.[8] The district court orally granted both requests for restraining orders on April 10.[9] When the MP/UP and ATSF returned to court on April 11 to iron out the terms of their restraining orders, they were accompanied by four CSX System railroads[10] which had filed a new Complaint earlier that morning after having filed notices of voluntary dismissals in the *Alton & Southern* case.[11] An April 11, the district court issued three separate restraining orders against picketing or strikes by the Brotherhood.

All four cases were assigned to the same judge and respondent asked that the cases be transferred to the district court which was hearing the *Alton & Southern* case. J.A. at 2. That motion was denied, and on April 21, 1986, the court conducted a hearing on petitioners' requests for preliminary injunctions. During the hearing, the court was presented with stipulations and evidence showing that each of the four rail systems involved provided traffic to and received traffic from the Guilford

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Fed. R. Civ. P., several hours before respondent BMWE served its answer. Petitioner MP did not file a similar notice of dismissal even though it had requested that such a notice be filed.

[8] Petitioner ATSF also filed a timely voluntary notice of dismissal from the *Alton & Southern* action on April 11.

[9] Due to an error in communications, respondent BMWE's pickets in Los Angeles were not informed of the oral orders until after they began to picket the UP yard. J.A. at 49. That yard was picketed because respondent believed, apparently mistakenly, that UP supervisors were on Guilford lines. *Id.*

[10] Those railroads are the Chessie system railroads: Baltimore & Ohio Railroad ("B&O"), Baltimore & Ohio Chicago Terminal Company; and Chesapeake & Ohio Railway ("C&O"), as well as CSX Transportation, Inc. which is, as of July 1, 1986, the new name for Seaboard System Railroad, Inc.

[11] The Joint Appendix in this case shows that the Chessie and CSX complaint was filed on April 10, 1986. J.A. at 1. That is in error as is the notation that a restraining order was issued in that case on April 10.

rail system, including the MEC and PT.[12] Three of the rail systems (BN, UP/MP and ATSF) did not connect with the Guilford rail system, but they, along with the CSX system, operated into Chicago, Illinois, which is an important gateway for the Guilford system. J.A. at 40, 54. Respondent BMWE informed the district court that it intended to picket the rail carriers in Chicago, which in the Brotherhood's opinion, would then interrupt the flow of traffic into and from the Guilford system, in order to place economic pressure on Guilford to force MEC and PT back to the bargaining table. J.A. at 43.

Unlike the other petitioners, the Chessie railroads connect with the Guilford rail system at three points —Buffalo, New York; Philadelphia, Pennsylvania; and Alexandria, Virginia. J.A. at 7. Those interchanges, however, are with the D&H. Besides providing significant amounts of traffic for the Guilford system (*see*, note 12, *supra*), the Chessie system exercised its discretion since the strike to provide other forms of assistance to the primary disputants' rail system. In March 1986, the Chessie system permitted the D&H to modify an interchange agreement so as to permit D&H supervisors, instead of Chessie operating employees, to interchange traffic at Buffalo. J.A. at 25-27. This modification prevented Chessie system employees from confronting the BMWE's pickets. *Id.* On April 6, 1986, the Chessie system provided five locomotives to the D&H to move approximately 100 cars from the Chessie's yard in Philadelphia into the Guilford system because the D&H was unable to move those cars itself. J.A. at 17-19, 28-29. Besides doing struck work, this act gave the Guilford

[12] The BN moved 1,400 cars in 1985 that were destined to or received from MEC and PT; the UP/MP system handled 601 cars destined for or received from MEC/PT in 1985; the ATSF handled 248 cars during that same year (Pet. App. at 34a-35a). The Chessie system received over $14 million in revenue from traffic routed to or from the Guilford system which involved over 25,000 rail cars (J.A. at 5); CSX Transportation derived over $5.4 million in 1985 from similar traffic movements with three of Guilford carriers, not including the B&M. J.A. at 37.

system five badly needed engines; some of those locomotives remained on the Guilford system until mid-April. J.A. at 18. Finally, the Chessie system continued to allow the D&H to use Chessie engines on run-through trains which passed through Buffalo until after the union sought to picket the Chessie system. J.A. at 16, 31. This lending of engines also relieved the strain which the lack of service-worthy engines created for the Guilford system. J.A. at 42.

B. Ruling Of Courts Of Appeals

On April 23, 1986, the district court issued a lengthy opinion granting petitioners' requests for a preliminary injunction, and respondents took an expedited appeal to the Seventh Circuit. On June 4, 1986, that court issued a decision reversing the district court and remanding with instructions to dismiss the complaints for want of jurisdiction. As the Seventh Circuit summarized (Pet. App. at 2a):

> The railroads defend the injunction on the principal ground that Congress could not have meant railroads, alone among America's principal industries, to be exposed to secondary picketing. We conclude, however, that Congress provided just this. Employees of railroads are not covered by the National Labor Relations Act, which prohibits secondary picketing and allows the National Labor Relations Board to seek injunctions. . . . The Railway Labor Act . . . does not prohibit secondary pressures, and this dispute therefore is governed by the Norris-LaGuardia Act, . . . which forbids courts to enjoin peaceful picketing growing out of labor disputes.

Respondents respectfully submit that the court of appeals' decision in this case is eminently correct and we ask this Court to affirm that decision.[13]

[13] Respondents have been authorized to state that the Railway Labor Executives' Association, a voluntary unincorporated association of the Chief Executive Officers of the nineteen standard labor organizations which collectively represent virtually all organized rail employees in this country, agrees with and supports respondents' position.

SUMMARY OF ARGUMENTS

Ignoring the constitutional foundations upon which peaceful secondary picketing rests, petitioners and *amici* argue that the federal courts have jurisdiction to, and should, enjoin that conduct. But when petitioners' and *amici*'s arguments are reduced of their rhetoric, their sole support lies in *Ashley, Drew & Northern Ry. v. UTU*, 625 F.2d 1357 (8th Cir. 1980), and in their belief that Congress could never have intended that the rail industry alone be subject to secondary pressure. However, all five Circuit Courts of Appeals (*see*, note 22, *infra*) which have addressed both or part of these issues during this recent strike have concluded that secondary pressure is indeed available to rail unions and may not be enjoined. Respondents respectfully submit that these decisions are clearly correct.

1. Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, specifically provides that: "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from" picketing and urging others to withhold their labor. If the terms of that Act are applied literally, it clearly deprives the federal courts of jurisdiction to enjoin peaceful picketing by BMWE of petitioners in this case—*i.e.*, a case "involving or growing out of a labor dispute." However, petitioners seek to avoid a literal application of Section 4 by arguing that an implied limitation must be read into Section 4 which restricts its application in railroad situations to cases where the labor organization shows that the target of the picketing is "substantially aligned" with the carrier with which it has the primary dispute. That restrictive construction of the Act is contrary to its plain language, its ex-

pressed intent and numerous decisions by this Court which have held consistently that the Norris-LaGuardia Act is to be applied literally and broadly. *Jacksonville Bulk Terminals, Inc. v. ILA*, 457 U.S. 702 (1982); *Marine Cooks & Stewards v. Panama Steamship Co.*, 362 U.S. 365 (1960); *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330 (1960).

2. Petitioners' arguments that the Norris-LaGuardia Act must be accommodated to the Railway Labor Act are without merit. First, it is improper to accommodate the policies of the Norris-LaGuardia Act to vague commands which are without substantive standards and which, if accepted, will allow federal courts to define what forms of peaceful self-help are permissible in a rail labor dispute where the right to self-help clearly exists. And second, respondent BMWE's conduct does not violate the Railway Labor Act, for that labor statute does not prohibit peaceful picketing, whether characterized as primary or secondary. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969). Secondary picketing in a pure Railway Labor Act dispute, respondent BMWE submits, is unregulated protected activity which does not violate any law of the United States. *Accord, Golden State Transit Corp. v. City of Los Angeles*, 89 L.Ed.2d 616 (1986); *United States v. Hutcheson*, 312 U.S. 291 (1941).

ARGUMENTS

I. Section 4 of the Norris-LaGuardia Act Withdraws Jurisdiction From The Federal Courts To Enjoin Respondents From Engaging In Peaceful Picketing Of Petitioners, For These Cases Clearly Involve And Grow Out Of A Labor Dispute With Other Railroads

Notwithstanding the clear intent of Congress in enacting both Section 20 of the Clayton Act, 29 U.S.C. § 52, and the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, to prohibit federal courts from being used as arbiters to decide which forms of self-help are permissible in labor

disputes, petitioners and *amici* urge this Court to adopt a construction of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, which does just that for rail and airline labor disputes. While the district court considered itself competent to undertake that task, the court of appeals disagreed, concluding that Congress had deprived the federal courts of jurisdiction to enjoin conduct enumerated in Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, even in rail labor disputes. Respondents respectfully submit that the court of appeals was correct, for its decision is in keeping with and, we submit, compelled by the language of the Norris-LaGuardia Act, by its legislative history, and by the oft repeated admonitions of this Court that this Act must be applied literally and broadly—*i.e.*, there are no implied exceptions in that Act for rail labor disputes. *E.g., Jacksonville Bulk Terminals, Inc. v. ILA*, 457 U.S. 702, 712 (1982); *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330, 335-36 (1960).

A. The Plain Language Of The Norris-LaGuardia Act Provides That The Federal Courts Do Not Have Jurisdiction To Enjoin the BMWE From Picketing Petitioners

It is axiomatic that the "starting point" in any case involving the interpretation of a federal statute is the "language employed by Congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Moreover, where the language chosen by Congress "admits of no exception[,]" it is error for a court to legislate such an exception by judicial construction. *TVA v. Hill*, 437 U.S. 153, 173 (1978). When those principles are applied to the Norris-LaGuardia Act, it is indisputable both that the plain and common meaning of the terms employed by Congress in that Act, and in particular in Section 4, provide that the federal courts do not have jurisdiction to enjoin the picketing which has been threatened in this case, and that it is error to read an exception into that unambiguous language for rail labor disputes.

Section 1 of the Norris-LaGuardia Act, 29 U.S.C. § 101, provides the overall theme of the Act and states that:

> [N]o court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

Section 2 of the Act, 29 U.S.C. § 102, sets forth that public policy and provides that the courts should look to that policy "[i]n the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited . . . ." Included in that public policy was Congress' declaration that to give individual workers "full freedom of association" and to protect employees' rights to bargain collectively, it was necessary that employees not be restrained in "concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 102. In other words, the Norris-LaGuardia Act was intended to be a form of labor's bill of rights and to protect labor's power in the delicate balance between the uncontrolled power of management and labor to further their respective interests. *See, Golden State Transit Corp. v. City of Los Angeles*, 89 L.Ed.2d 616 (1986).

To implement that policy, Congress then undertook to correct many of the abuses of the past, the primary one being federal court injunctions which restrained forms of self-help which Congress had declared to be proper. To correct that particular abuse, Congress included in Section 4 of the Act specifically enumerated types of union activities that were to be protected from restraint. *United States v. Hutcheson*, 312 U.S. 219, 236-37 (1941). Section 4, as relevant to this case, accomplished that purpose by providing (29 U.S.C. § 104):

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment; . . .

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence; . . . [and]

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified . . . .

In order to avoid any ambiguity over the scope of the terms used throughout the Act and, in particular, in the first paragraph of Section 4, which the courts could use to limit that scope by "whittl[ing] away by refined definitions of what persons are to be regarded as legitimately involved in labor disputes" (S. Rpt. No. 163, 72d Cong., 1st Sess. at 25 (1932)), Congress included as Section 13 of the Act, 29 U.S.C. § 113, definitions of the terms "involving or growing out of a labor dispute" (§ 13(a)), "persons participating or interested in such dispute" (§ 13(b)), and "labor dispute" (§ 13(c)).

As pertinent here, Congress defined the term "labor dispute" as follows: "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 113(c). That term obviously includes the dispute between the BMWE and MEC/PT.

Further, Congress provided in Section 13(a) that: "A case shall be held to involve or to grow out of a labor

dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein . . . ." 29 U.S.C. § 113(a). The plain language and ordinary meaning of Section 13(a) clearly covers this case, for it is beyond question that petitioners and the rail employees working for them are persons engaged in the same industry as MEC/PT and MEC/PT employees who are represented by the Brotherhood. Moreover, it should be beyond question that the Brotherhood's intent to picket "involves or grows out of" its labor dispute with MEC and PT, for the record does not contain even the slightest suggestion that the union would expend the time and effort to picket petitioners or, more importantly, would ask the rail employees involved to incur the suffering which such picketing entails, except in the aid of a fair and just resolution of its labor dispute with MEC and PT. Indeed, petitioners have not asserted that the BMWE's conduct has been motivated by a concern unconnected to its labor dispute with MEC and PT; rather, petitioners are merely asserting that the BMWE's actions will be ineffectual in accomplishing their purpose because they are not "substantially aligned" with MEC and PT.

As shown above, when the plain language of Section 4 is applied to this case, it should be beyond question that this proceeding and the activities at issue "involve or grow out of a labor dispute" within the plain meaning of the Norris-LaGuardia Act. And since the actions at issue—*i.e.*, peaceful picketing—are comprised solely of conduct specifically enumerated in subsections (e) and (i) of Section 4 (*i.e.*, giving publicity to the existence of a labor dispute by patrolling to urge others to withhold their labor) and are designed to ask rail employees to perform the acts specified in subsection (a) of that section (*i.e.*, withholding of labor), it must be concluded that Section 4 of that Act is applicable to this case. As this Court stated in *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980): "The language of the

statute is clear, and we have historically assumed that Congress intended what it enacted."

Notwithstanding the clear import of the language Congress used in the Norris-LaGuardia Act, and in particular in Sections 4 and 13, to express its commands, petitioners nevertheless assert that Congress did not intend that language to immunize the picketing of railroads which are not substantially aligned with the primary disputant in a rail labor dispute. In other words, according to petitioners, the Norris-LaGuardia Act was not intended to apply to secondary picketing in the rail industry. *See*, note 21, *infra*. Respondents BMWE, *et al.*, disagree, for the Act's legislative history clearly shows that petitioners' contention is without merit.

B. The Legislative History Shows That Congress Intended To, And Did, Immunize Secondary Picketing By Rail Unions From Federal Court Injunctions

Contrary to petitioners' and *amici*'s beliefs, the Norris-LaGuardia Act is not an aberration which was unimportant when enacted and which is even less binding today. Rather, the legislative history of that Act shows that it was enacted by Congress to establish in clear, unmistakable and enforceable terms the right of labor to use certain, specifically enumerated forms of self-help as proper concerted economic pressure for their mutual aid and protection. That Act, as this Court has explained, did far more than simply remove the fetters which federal court injunctions had placed on labor's right to exert concerted economic pressure; rather:

> The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act [38 Stat. 730 (1914)] by infusing into it the immunized trade union activities as redefined by the later Act. In this light § 20 [of the Clayton Act, 29 U.S.C. § 52] removes all such allowable conduct from the taint of being a "violation of any law of the United States," . . . .

United States v. Hutcheson, *supra*, 312 U.S. at 236. In other words, Congress established by the Norris-LaGuardia Act the type and scope of union activities which it declared were to be unregulated forms of concerted activity which were not to be considered as a violation of any federal law. As both the history and background of the Act demonstrate, Congress contemplated union secondary self-help activity when it enacted the Norris-LaGuardia Act, and it considered such activity to be a legitimate economic weapon which was to be protected by that Act.

(i) *Secondary Activity And The Clayton Act*

At the turn of the century, state and federal courts were divided over how to deal with activity by a labor organization which was directed against a "neutral" employer and intended to bring economic or other pressure to bear on the "primary" employer involved in a dispute. In so far as the states were concerned, such secondary pressure was condemned in Massachusetts, for example, but permitted in New York. *See*, F. Frankfurter and N. Greene, THE LABOR INJUNCTION 42-45 (MacMillan, 1930) [hereinafter, "*The Labor Injunction*"].[14]

This conflict also arose in the federal courts, especially in rail cases, because those courts were frequently used by employers to enjoin strikes. *See*, G. Eggert, RAILROAD LABOR DISPUTES, 108-35 (Univ. of Michigan Press 1968). With the enactment of the Sherman Antitrust Act, "[p]assed primarily as a safeguard against the social and economic consequences of massed capital" (*The Labor Injunction* at 8), employers and the federal courts were given a new weapon to wield against labor. *See*, Id. at 8-9. The use of the antitrust law to enjoin labor activity

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[14] New York law provided prior to 1920 that "[a] strike or threat to strike may be brought to bear upon neutrals, provided that neutrals thus used as a lever are within the same industry as those in whose coercion the union is primarily interested." *The Labor Injunction* at 45.

was affirmed by the Supreme Court in a secondary activity case, *Loewe v. Lawlor*, 208 U.S. 274 (1908) (the "*Danbury Hatters* Case"), where the union employed "unfair" lists and "the primary and secondary boycott" in its effort to unionize the employees of hat manufacturers. *Id.* at 305-08.

This use of injunctions by federal courts to prevent peaceful picketing in labor disputes was condemned by many and, in 1914, Congress decided to define for the federal courts the proper scope of self-help. It did this by enacting the second paragraph of Section 20 of the Clayton Anti-Trust Act,[15] which, as the House Report on this portion of the legislation provided, was

> concerned with specific acts which the best opinion of the courts holds to be within the right of parties involved upon one side or the other of a trades dispute. The necessity for legislation concerning them arises out of the divergent views which the courts have expressed on the subject and the difference between courts in the application of recognized rules.

H. Rpt. No. 627, 63d Cong., 2d Sess. at 30 (1914), appending H. Rpt. No. 612, 62d Cong., 2d Sess. (1912). Section 20 of the Clayton Act, the result of this legislative effort, provided in pertinent part that:

> . . . [N]o . . . restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or *from ceasing to perform any work or labor*, or *from recommending, advising, or persuading others by peaceful means so to do*; or from attending *at any place* where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or *from peacefully persuading any person to work or to abstain from working . . .; nor shall any of the acts*

[15] Pub. L. No. 212, 38 Stat. 730, 738 (1914), codified as 29 U.S.C. § 52.

> *specified in this paragraph be considered or held to be violations of any law of the United States.*

29 U.S.C. § 52 (emphasis added).

Disregarding the clear intent of the labor provisions of the Clayton Act, petitioners assert that "secondary boycotts" were uniformally condemned by 1926. Pet. Brief at 20. That assertion, respondents submit, is incorrect and misleading. First, there was very little consensus of opinion as to what in fact was a "secondary boycott." *See*, 51 Cong. Rec. 9658, col. 2 (1914) (Remarks of Reps. Volstead and Maher). And second, while there appeared to be by 1914 a recognition that a pure secondary boycott—*i.e.*, pressuring a neutral not to patronize a primary disputant—may be beyond the pale of permissible self-help, it was also recognized that such action, in many instances, could not be divorced from labor's rights, which all acknowledged existed, to refuse to perform any labor and to ask others to refuse to perform labor. As Senator Hughes stated during the floor debates on the Clayton Act of 1914:

> When you come to legislate against a secondary boycott you must legislate against a sympathetic strike, and that is the reason why I want to clear it up if I can. Men, in my opinion, have a right to strike; they have a right to institute a sympathetic strike; an unreasonable strike; or a strike for any reason or for no reason.

51 Cong. Rec. 13923, col. 2 (1914) (Remarks of Sen. Hughes). Senator Hughes' remarks were echoed by the other Senators who were debating the wisdom of enacting the labor provisions of the Clayton Act, including Section 20. *Id.* (Remarks of Sens. Borah and Cummins.)

Ignoring the impact of the Clayton Act, petitioners' assert that cases such as *Toledo, Ann Arbor & North Michigan Ry. v. Pennsylvania Co.*, 54 Fed. 730 (N.D. Ohio 1893), and *United States v. Debs*, 64 Fed. 724 (N.D. ILL. 1894), *pet. for writ of habeas corpus denied*,

158 U.S. 564 (1895), represented the state of the law in Congress' view in 1926. That assertion is incorrect. First, the continued validity of those cases was questioned by the minority report to what became Section 20 of the Clayton Act, when those Congressmen opined that, if accepted, the bill would prohibit the injunctions which was issued in the *Toledo* case against the boycott of Toledo & Ann Arbor cars by non-Toledo & Ann Arbor employees, and which underlyed the *Debs* case which arose from the boycott of Pullman cars by rail employees. H. Rpt. No. 627, 63d Cong., 2d Sess., Part 2, at 20-21 (1914), appending Minority Report to H. Rpt. No. 612, 62d Cong., 2d Sess. (1912). When the House version of the bill was introduced in the Senate, Sen. Ashurst, one of its supporters, explained the need for this legislation and stated:

> In order that I may not be deemed to have overshot myself and allowed an intemperate or imprudent statement to escape my lips on this subject, I will insert in the RECORD at this point a few samples calling attention to some of the harsh and unreasonable decisions of the courts on this subject [*i.e.*, injunctions against laboring men].
>
> Labor Decisions and Injunctions
>
> Refusing to haul cars a conspiracy (T.A. & N.M. Ry v. Pennsylvania Co., 54 Fed. Rep., 730, Apr. 3, 1893). . . .
>
> A boycott is an unlawful conspiracy (Thomas V. C., N.O.&T.P. Ry. Co., 62 Fed. Rep., 803) . . . .

51 Cong. Rec. 13664 (1914) (Remarks of Sen. Ashurst).[16]

A second reason why the *Toledo* and *Debs* case ceased to be good law as of 1914 is that the last clause of Sec-

[16] *See also*, colloquy between Sens. Hughes, White, Cummins and Borah on validity of Pullman boycott under bill, in which all agreed that a concerted refusal to work, even for a neutral, should not be enjoined. 51 Cong. Rec. 13922-23 (1914).

tion 20[17] expressly overruled the use of statutes such as the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, to support a finding that the enumerated forms of self-help were unlawful. *See*, 51 Cong. Rec. 9653, col. 1 (1914) (Remarks of Rep. Webb).[18] The House bill was amended as Representative Webb proposed and provided that the acts specified in the section shall not be "considered or held unlawful." At first the Senate proposed to limit that clause to violations of the anti-trust laws. S. Rpt. No. 698, 63d Cong., 2d Sess. at 51 (1914). But, when the bill was considered on the Senate floor, the Senate Judiciary Committee agreed to delete the words "anti-trust laws" and to insert "any law of the United States." 51 Cong. Rec. 14364 (1914) (Remarks of Sen. Culberson). When Senator Smith of Georgia asked "What is there beyond that [*i.e.*, antitrust laws] that we wish to relieve him [*i.e.*, laborer] of?" (51 Cong. Rec. 14367, col. 1), Senator Walsh replied: "I have not the cases in mind myself, and I do not recall having seen them, but I am told that there are one or two other statutes that have occasionally been appealed to by Federal courts as justification for the issuance of injunctions in these labor disputes." *Id.* The amendment then passed (*Id.*), was accepted by the Conference Committee and became the law.

Unfortunately, the will of Congress was not complied with fully, for in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921), this Court held that certain secondary boycotts and picketing were not protected under

[17] That clause provides as follows: "[N]or shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." 29 U.S.C. § 52.

[18] Rep. Webb stated in explaining the Judiciary Committee's proposed amendment:

> [T]he committee feels that no harm can come from making those acts legal on the law side of the court, for anything that is permitted to be done in conscience [*i.e.*, equity] ought not to be made a crime or forbidden in law.

the Clayton Act because that Act applied only to injunctions sought by employers against their own employees.[19] The *Duplex* Court stressed what it perceived to be "extreme and harmful consequences" of protecting secondary activity. *See, Id.* at 477. Justice Brandeis, with whom Justices Holmes and Clarke joined, argued in a strong dissent that Congress had passed the Clayton Act precisely because of the persistent judicial practice of enjoining "picketing and persuading others to leave work" when "a judge considered [such activity] socially or economically harmful." *Id.* at 484-85 (Brandeis, J., dissenting). *See also, Bedford Cut Stone Co. v. Stone Cutters*, 274 U.S. 37 (1927).

(ii) *Secondary Pressure And The Norris-LaGuardia Act*

The *Duplex* and *Bedford* cases eventually led to the passage of the Norris-LaGuardia Act. Moreover, that Act's broad definitions in Section 13 were expressly intended to overrule the Court's limitations on secondary activities in the *Duplex* and *Bedford* cases, and to eliminate any doubt that Congress sought to remove the federal courts from defining the proper boundaries of permissible self-help in labor disputes. *See, Jacksonville Bulk Terminals, Inc. v. ILA, supra*, 457 U.S. at 711-20. Those conclusions are inescapable from the Act's legislative history, including then Professor Frankfurter's work, *The Labor Injunction*, which urged and detailed the need for the Act.

For example, the report of the House Committee on the Judiciary, H. Rpt. No. 669, 72d Cong., 1st Sess. (1932), which reported the Bill which became the Norris-LaGuardia Act, stated that:

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[19] *Duplex* involved a strike against a Michigan manufacturer of printing presses which had refused to consent to a union shop. Other locals of the same union employed secondary pressure on the New York companies delivering, installing, and maintaining the presses. *See, Duplex*, 254 U.S. at 462-64.

> The purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act, . . . which Act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent.

Id. at 3. After noting that Section 4 of the bill enumerated "the same character of acts which Congress in section 20 of the Clayton Act . . . sought to restrict from the operation of injunctions" (*Id.* at 7-8), the Committee stated that:

> In the case of Duplex Printing Press Co. v. Deering (254 U.S. 443), decided January 3, 1921, and being a six to three decision, the court held so far as pertinent to this particular discussion that this section of the Clayton Act provided a restriction upon the use of the injunctions in favor only of the immediate disputants and that other members of the union not standing in the proximate relation of employer and employee could be enjoined. *Of course, it is fundamental that a strike is generally an idle gesture if confined only to the immediate disputants.* This is intended to be remedied by the later provision in this act defining the meaning of the term, "person participating in a labor dispute," as to whom, as in the bill defined, the courts are deprived of jurisdiction to issue injunctions in the specified instances set forth in this section.

Id. at 8 (emphasis added). Finally, as the Committee explained in describing the definitions section of the bill (*Id.* at 10):

> It is hardly necessary to discuss them other than to say that these definitions include . . . a definition of a person participating in a labor dispute which is broad enough to include others than the immediate disputants and thereby corrects the law as announced in the case of Duplex Printing Co. v. Deering . . . .

The Senate Judiciary Committee's Report, S. Rpt. No. 163, *supra*, at 25, contained comparable language, and summarized the bill as follows:

> The proposed bill is designed primarily as a practical means of remedying existing evils, and limitations are imposed upon the courts in that class of cases wherein these evils have grown up and become intolerable. This is a reasonable exercise of legislative power, and in order that the limitation may not be whittled away by refined definitions of what persons are to be regarded as legitimately involved in labor disputes, the bill undertakes specifically to designate those persons who are entitled to invoke the protections of the procedure required.

See also, H. Rpt. No. 669, *supra*, at 11. As the Senate report makes clear by referring to rail labor throughout its report, rail labor was included within the class of persons entitled to invoke the protections of the Act. S. Rpt. No. 163, *supra*, at 10-12.

By consciously expanding the class of employees eligible for the protections of the Act beyond the immediate disputants, Congress legitimized "secondary activity" which is a term of art in labor law and refers to "pressure tactically directed toward a neutral employer in a labor dispute not his own." *National Woodwork Manufacturers Assoc. v. NLRB*, 386 U.S. 612, 623 (1967) (footnote omitted). As this Court explained in the *National Woodwork* case (386 U.S. at 622-23) (footnote omitted):

> As a result of the Court's decisions limiting § 20 of the Clayton Anti-trust Act,] . . . "primary" but not "secondary" pressures were excepted from the antitrust laws . . . .
>
> In 1932 Congress enacted the Norris-LaGuardia Act and tipped the scales the other way. Its provisions "established that the allowable area of union activity was not to be restricted, as it had been in the Duplex case, to an immediate employer-employee relation." . . . Congress abolished, for purposes of labor immunity, the distinction between primary activity between the "immediate disputants" and secondary activity in which the employer disputants

> and the members of the union do not stand "in the proximate relation of employer and employee . . . ."

Thus, from the passage of the Norris-LaGuardia Act, "[i]t was widely assumed that, prior to 1947, the Norris-LaGuardia Act prevented federal courts from enjoining any 'secondary boycotts.'" *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 387 (1969).

Indeed, the courts which had passed on this question prior to 1947 had concluded that a suit to enjoin secondary picketing presented a "case involving or growing out of a labor dispute." *E.g., Lee Way Motor Freight, Inc. v. Keystone Freight Lines, Inc.*, 126 F.2d 931 (10th Cir.), *cert. denied*, 317 U.S. 645 (1942); *Taxi-Cab Drivers v. Yellow Cab Operating Co.*, 123 F.2d 262 (10th Cir. 1941); *see also, United States v. Hutcheson, supra*; *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-06 (2d Cir. 1942); *see generally, Amalgamated Assoc. of Street, Electric Employees v. Dixie Motor Coach Corp.*, 170 F.2d 902, 905 (8th Cir. 1948). Consequently, it is clear that the legislative history supports and, indeed, requires a broad and literal application of the Norris-LaGuardia Act in this case.

Nevertheless, petitioners refer to portions of the congressional debates on the proposed legislation which became the Norris-LaGuardia Act (Pet. Brief at 40-42) to argue that the Act applies differently to rail labor disputes, for, petitioners assert, Congress in 1932 intended to allow injunctions to be used to remedy violations of the Railway Labor Act and to prevent the expansion of rail strikes beyond the primary disputants. Respondents BMWE, *et al.*, disagree with petitioners' reading of the legislative history, for that history clearly shows that Congress intended the Act to apply to *all* labor disputes, including rail disputes, in exactly the same manner.

Shortly before the final bill was passed by the House, Congressman Beck proposed an amendment which would

have removed rail labor disputes from Section 4 of the Act. 75 Cong. Rec. 5503, col. 2 (1932). In addressing that proposal, Congressman LaGuardia stated that there was no need for the amendment, for the Railway Labor Act gave the public all the protection it needed by providing certain bargaining obligations and procedures which were designed *to settle disputes*,[20] and that Section 8 of the proposed anti-injunction bill required a plaintiff in a suit seeking an injunction to exhaust those procedures before seeking court aid. 75 Cong. Rec. at 5504, col. 2 (Remarks of Rep. LaGuardia). As Congressman LaGuardia summarized in opposing the proposed amendment (*Id.*; emphasis added):

> So that there is the tie-up between the provisions of the railroad labor act and the necessity of exhausting every remedy to adjust any difference which might arise. The workers could not and would not think of going on strike *before* all the remedies provided in the law have been exhausted. . . .

Congressman Beck's amendment was defeated (75 Cong. Rec. at 5505, col. 1), and, thus, the necessary conclusion from this legislative history is that Congress clearly intended the Norris-LaGuardia Act, including Section 4, to apply to rail labor strikes. *See also*, 75 Cong. Rec. 5499, col. 2 (Remarks of Reps. Lankford and Beck). Moreover, there is not the slightest indication in the Act's legislative history that Congress believed that the bill would apply differently to rail disputes so as to limit its application to the primary disputants and not, as the bill's language provided, to any person participating or interested in the labor dispute.

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[20] When Congressman LaGuardia's remarks are considered in light of the fact that the Railway Labor Act was singularly successful in preventing strikes (*see*, pages 41-42, *infra*), it becomes clear that the Congressman meant that the Railway Labor Act provided processes which enabled rail disputes to be settled short of strikes, not that it prohibited strikes or secondary activity as petitioners argue.

C. This Court Has Specifically Rejected Narrow Interpretations Of The Norris-LaGuardia Act Which Would Both Limit The Reach Of The Act And Re-insert The Federal Courts Into The Labor Injunction Business

When it enacted the Norris-LaGuardia Act, Congress explained that its severe limitation on federal court jurisdiction was considered necessary as the only practical means "of remedying existing evils." As Congress added: "[I]n order that the limitation [of jurisdiction] may not be whittled away by refined definitions of what persons are to be regarded as legitimately involved in labor disputes, the bill undertakes specifically to designate those persons who are entitled to invoke the protections of the procedure required." H. Rpt. No. 669, *supra* at 11. Such a stated purpose requires a broad, literal reading of the Act's operative language, and this Court has emphasized many times in rail labor and other cases that such a broad reading of the Act is mandatory. For example, in *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330, 335-36 (1960) (footnotes omitted; emphasis added), the Court stated in reference to a question as to the definition of a "labor dispute":

> Unless the literal language of this definition is to be ignored, it squarely covers this controversy. Congress made the definition broad because it wanted it to be broad. There are few pieces of legislation where the congressional hearings, committee reports, and the language in the legislation itself more clearly point to the necessity for giving an Act a construction that will protect the congressional policy the Act adopted. . . . *The hearings and committee reports reveal that Congress attempted to write its bill in unmistakable language because it believed previous measures looking toward the same policy against nonjudicial intervention in labor disputes had been given unduly limited constructions by the courts.*

It should be noted that in the *Railroad Telegraphers* case, a railroad case, this Court gave no indication that the Act applied any differently to employees or disputes subject to the Railway Labor Act.

While the *Railroad Telegraphers* case dealt with the scope of Section 13(c) of the Act (*i.e.*, the definition of "labor disputes"), the same analysis applies in construing the scope of Section 13(a)'s definition of when a case involves or grows out a labor dispute, because in a companion case, *Marine Cooks & Stewards v. Panama Steamship Co.*, 362 U.S. 365 (1960), the Court addressed the scope of Section 13(a) and reached a comparable conclusion. In *Marine Cooks*, the Court was presented with the picketing of a foreign ship manned by foreign crewmen and a threat to extend the picketing to the cargo's consignees in protest over the loss of U.S. flag jobs to foreign vessels. As the Court explained in addressing an argument that the case did not involve or grow out of a labor dispute because the ship being picketed and the cargo's consignees were not parties to the underlying dispute (362 U.S. at 370) (footnotes omitted):

> It is difficult to see how this controversy could be thought to spring from anything except one "concerning terms or conditions of employment," and hence a labor dispute within the meaning of the Norris-LaGuardia Act. The protest stated by the pickets concerned "substandard wages or substandard conditions." The controversy does involve, as the Act requires [in § 13(a)], "persons who are engaged in the same industry, trade, craft, or occupation." And it is immaterial under the Act that the unions and the ship and the consignees did not "stand in the proximate relation of employer and employee." This case clearly does grow out of a labor dispute within the meaning of the Norris-LaGuardia Act.

Respondent BMWE respectfully submits that, as in the *Marine Cooks* case, it is difficult to see how the case at bar can be thought to spring from anything else but the BMWE's dispute with MEC/PT, for the union's sole

reason for engaging in secondary picketing is to resolve its primary dispute.

Petitioners assert, however, that, notwithstanding the Act's plain language, there is an implicit requirement in the Act that its withdrawal of jurisdiction provisions do not apply to picketing against a neutral rail employer unless the union establishes that the secondary rail employer has aligned itself with the primary carrier in some substantial manner.[21] While that position is supported by *Ashley, Drew & Northern Ry. v. UTU*, 625 F.2d 1357 (8th Cir. 1980), it is contrary to this Court's subsequent decision in *Jacksonville Bulk Terminals, supra*, and to the recent decisions by the four circuit courts of appeals which have considered this issue recently.[22] Respondents BMWE, *et al.*, respectfully submit that this Court should also reject *Ashley Drew*.

In *Ashley Drew*, the Eighth Circuit, without relying upon the fact that the case before it involved a rail dispute, explained its approach to the Norris-LaGuardia Act as follows:

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[21] In labor parlance, this means that the activity is no longer "secondary." Under the National Labor Relations Act, a third-party employer who "substantially aligns" himself with the primary employer in a labor dispute loses his protected neutral status and becomes a primary employer. A union striking the primary employer is then free to picket the ally, or take whatever other action against the ally as could be taken against the primary. A classic explanation of this principle, known as the ally doctrine, is set forth in *NLRB v. Electrical Workers*, 228 F.2d 553 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956). In such a case, secondary activity is not involved for the allied employer is no longer considered a neutral to the dispute.

[22] Besides the case at bar, those decisions are: *Central Vermont Ry. v. BMWE*, 793 F.2d 1298 (D.C. Cir. 1986); *RF&P* case, *supra; Norfolk & Western Ry. v. BMWE*, 795 F.2d 1169 (4th Cir. 1986), *pet. for cert. pending*, Sup. Ct. No. 86-175; *D&H* case, *supra*. The Second Circuit has also considered a related question in *Conrail v. BMWE*, 792 F.2d 303 (2d Cir. 1986), *pet. for cert. pending*, Sup. Ct. No. 86-353.

> Most courts considering the scope of section 13(a) . . . have not relied on a literal reading. Instead, these courts have come to results in accord with the following test: when a non-struck employer seeks to have a union's activities enjoined by a federal court the case involves or grows out of a labor dispute—and thus the Norris-LaGuardia anti-injunction provisions apply—only when the offending activity is furthering the union's economic interest in a labor dispute.

625 F.2d at 1363. Although the Act does not contain any specific standards which can be used to define the parameters of the "economic interest" test, the Eighth Circuit looked to the Fifth Circuit's decision in *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir.), *aff'd by an equally divided Court*, 385 U.S. 20 (1966), and concluded that:

> Under this "economic self-interest test," the subject matter of the present case—the picketing of [the second carrier]—would involve or arise out of the [primary] labor dispute if [the second carrier] were "substantially aligned" with [the primary carrier].

625 F.2d at 1364. This result was, in the *Ashley Drew* court's opinion, consistent with the Norris-LaGuardia Act, for according to the court (625 F.2d at 1366):

> [I]t is reasonable to conclude that section 13(a) was meant to preclude injunctive interference with bargaining or organizing on an industry-wide or craft-wide basis. It was not meant to extend an anti-injunctive shield for union activities beyond the place where the union's interests in a labor dispute cease. . . .

Although the *Ashley Drew* "substantial alignment" test is different and far more restrictive than the Fifth Circuit's "economic self-interest" test (*compare, Brotherhood of Railroad Trainmen v. Atlantic Coast Line R.R.*, *supra*, 362 F.2d at 654-55 (economic self-interest may be satisfied by interests of employees honoring picket lines), *with, Ashley Drew, supra*, 625 F.2d at 1363-64), both tests, respondent BMWE respectfully submits, conflict with the plain language of the Norris-LaGuardia Act (including in particular § 13(a) and (b)), Congress' intent in enacting that legislation, and this Court's interpretation of the scope of that Act.

A fundamental problem with both the "substantial alignment" and "economic self-interests" tests is that those tests require the federal courts to examine the motives for union conduct which on its face is immunized by Sections 4 and 13(a) of the Norris-LaGuardia Act to determine the "place" where the union's interest in a labor dispute ceases. However, since neither test is either directly or by implication set forth in the Act,[23] the courts are virtually free to apply their own notions of what is permissible economic activity in defining the limits of either test. Indeed, this is exactly what the district court did in this case by ignoring the union's clearly expressed reasons for engaging in secondary picketing and by concentrating solely on the degree of business relations between petitioners and the MEC and PT. *See*, Pet. App. at 36a.

Such free-wheeling judicial interference in labor disputes is contrary to the very purposes of the Norris-LaGuarida Act, for the Act's legislative history shows that Congress deliberately used broad language in the Act enumerating both the specific types and the scope of union activities which were to be immunized, in order to pre-

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[23] These standards are not provided by the Railway Labor Act or by any other federal legislation, for as explained *infra* at pages 45-46, the Railway Labor Act does not contain any standards which may be used to limit secondary activity. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., supra*, 394 U.S. at 391. Moreover, this Court also observed that: "The very complexity of the distinctions [between primary and secondary activity] . . ., if nothing else, plainly demonstrates that we lack the expertise and competence to undertake this task [*i.e.*, adopting the NLRA's principles on secondary activity to railway disputes] ourselves." *Id.* at 392.

vent federal courts from inquiring into the union's motivation for engaging in that conduct. *United States v. Hutcheson, supra*, 312 U.S. at 236-37. As this Court has noted before, by enacting clear "mileposts for judges to follow" (75 Cong. Rec. 4935 (1932) (remarks of Sen. Bratton)), Congress intended to prevent "one of the greatest evils associated" with labor injunctions—*i.e.*, the use of legal doctrines "which often made the lawfulness of a strike depend upon judicial views of social and economic policy." *Jacksonville Bulk Terminals, Inc. v. ILA, supra*, 457 U.S. at 715. Both the "substantial alignment" and the "economic self-interest" tests, however, require a federal court to pass on the reasonableness of the union's secondary activity and, thus, both tests clearly "embroil federal judges in the very scrutiny of 'legitimate objectives' that Congress intended to prevent when it passed that Act." *Id.* at 719. As this Court observed in the *Jacksonville Bulk Terminals* case (457 U.S. at 719-20) (footnote omitted):

> The applicability not only of § 4, but also of all of the procedural protections embodied in that Act, would turn on a single federal judge's perception of the motivation underlying the concerted activity. The Employer's interpretation [and BMWE submits, both the *Ashley Drew* and *Atlantic Coast Line* tests, are] . . . simply inconsistent with the need, expressed by Congress when it enacted the Norris-LaGuardia Act, for clear "mileposts for judges to follow." . . .

In *Jacksonville Bulk Terminals*, this Court expressly rejected the use of any test, except the Act's plain language, to determine the scope of the protections afforded by that Act. 457 U.S. at 713-20. As the Ninth Circuit explained in *Smith's Management Corp. v. IBEW*, 737 F.2d 788, 791 (9th Cir. 1984) (emphasis added), in rejecting an implied test to determine if the Norris-LaGuardia Act's protections are applicable:

> Mindful that "the term 'labor dispute' must not be narrowly construed," . . . we reject the "economic self-interest test" applied by the Fifth and Eighth Circuits and urged upon us by Smith's. We decline to adopt a rule which would exclude a secondary boycott from the anti-injunction provisions of the Norris-LaGuardia Act simply because the union is unable to establish that the secondary employer is in fact "substantially aligned" with the primary employer. *Such a rule puts the courts in the untenable position of second-guessing a union as to the effectiveness of a particular boycott in achieving a union's goals.*

737 F.2d at 791 (emphasis added). That conclusion is compelled by this Court's earlier decisions on the scope of the Act, for this Court has expressly forbidden judicial intrusions into a union's motivation. *Jacksonville Bulk Terminals, supra*, 457 U.S. at 719 n.19 and accompanying text; *United States v. Hutcheson, supra*, 312 U.S. at 232.

Petitioner's attempt to create a different rule of law in this case by asserting that the Norris-LaGuardia Act should be viewed as applying differently in rail labor disputes. Pet. Brief at 47. That argument, respondents respectfully submit, lacks any merit, for the Act's language and its legislative history are devoid of any indication that Congress intended to allow federal courts to examine the wisdom of a union's call for help in a rail labor dispute, but to forbid any such inquiry in other disputes. As the Seventh Circuit so clearly explained in this case (Pet. App. at 22a-23a):

> Under the "substantial alignment" test of *Ashley, Drew* the court must assess the wisdom of the union's call on the help of employees of the secondary employer. Will a strike at the secondary employer put "a lot" of pressure on the primary employer? If so, the union may make the call; if not, not. A court applying the "substantial alignment" test is weighing the economic gains to the union's members from secondary pressure against the losses the secondary conduct imposes on others in society. It is only a small exaggeration to say that this is exactly what courts were doing before 1932, exactly why Congress

passed the Norris-LaGuardia Act. The union, its members, and the workers on whom the union calls for help—not the courts—must decide how "substantial" an "alignment" ought to be to make secondary pressure appropriate. See *United States v. Hutcheson*, 312 U.S. at 236-37.

Respondents respectfully submit that the court of appeals was correct in concluding that this case is indeed one "involving or growing out of a labor dispute" and that petitioners are seeking to enjoin "persons participating or interested in such dispute . . . from doing, whether singly or in concert" acts specifically enumerated in Section 4 of the Norris-LaGuardia Act. Consequently, the district court was without jurisdiction to issue an injunction in the case unless there is some reason to accommodate the principles of the Norris-LaGuardia Act to another federal *labor* legislation.[24] As shown below, and as the court of appeals concluded, however, petitioners are incorrect in asserting that the Norris-LaGuardia Act must be, or should be, accommodated to the Railway Labor Act in this case.

II. Contrary To Petitioners' And *Amici*'s Assertions, Peaceful Secondary Pressure Does Not Violate Any Command Of The Railway Labor Act; Consequently, There Is No Legitimate Reason To Accommodate The Strictures Of The Railway Labor Act

Surmising that the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, was intended to outlaw all forms of sec-

[24] Although petitioners initially asserted below that unlawfulness under the Interstate Commerce Act, 49 U.S.C. § 10101, justified an injunction notwithstanding the Norris-LaGuardia Act, they have apparently abandoned that argument before this Court. *But see*, Pet. Brief at 39. In view of the last clause in Section 20 of the Clayton Act and this Court's statements in *Order of Railroad Telegraphers v. Chicago & North Western Ry., supra*, 362 U.S. at 339 n.15, the abandonment of that argument was a wise decision, because as this Court stated in the *Telegraphers'* case: "[U]nlawfulness under nonlabor legislation [does] . . . not remove the restrictions of the Norris-LaGuardia Act upon the jurisdiction of federal courts . . . ." *Id.*

ondary pressure from being viewed as permissible forms of self-help in rail labor disputes, petitioners and *amici* argue that the provisions of the Norris-LaGuardia Act withdrawing federal court jurisdiction to enjoin such activity may be ignored in this case. That argument was rejected by the Seventh Circuit because, after a careful review of the Railway Labor Act, especially as construed by this Court in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969), the court of appeals concluded that peaceful secondary pressure is unregulated activity that is neither prohibited by the Railway Labor Act nor enjoinable notwithstanding the strictures of the Norris-LaGuardia Act. Pet. App. at 16a-17a. Respondents BMWE, *et al.*, respectfully submit that the court of appeals was correct, for an examination of the Railway Labor Act's legislative history, both in 1926 and in 1934 when it was substantially modified, shows that Congress did not intend to remove peaceful secondary pressure from the arsenal of self-help measures which are available to rail labor once the Act's major dispute resolution processes are exhausted unsuccessfully.

An examination of the Railway Labor Act itself to find an expression either banning or permitting peaceful secondary pressure is, as all parties to this case recognize, fruitless, for as this Court observed in the *Jacksonville Terminal* case, the Act is totally silent as to "what is to take place once [the Act's processes for resolving a dispute over the formation of new agreements] . . . have been exhausted without yielding resolution of the dispute." 394 U.S. at 378. To overcome this silence, petitioners and *amicus* National Railway Labor Conference ("NRLC") look to the Act's purposes, and to federal court decisions as to permissible forms of self-help around the turn of the century, to argue that all forms of economic pressure against "neutrals" are inherently banned by the Act. Respondents disagree, for as the First Circuit recently observed in rejecting a similar argument: "In the face of this legislative si-

lence [in the Railway Labor Act as to whether secondary pressure is prohibited], the conclusion that Congress meant to proscribe such activities can only be reached by surmise and speculation." *D&H* case, *supra*, 803 F.2d at 1231. Indeed, as we will show below, when Congress' intent is examined, it becomes clear that petitioners' and *amicus'* surmise and speculation is wrong. Moreover, in the absence of a clear prohibition in the Act, it is improper to ignore the express language in Section 4 of the Norris-LaGuardia Act withdrawing jurisdiction to enjoin such peaceful economic pressure.

A. The Railway Labor Act Does Not Restore To The Federal Courts Jurisdiction Which The Norris-LaGuardia Act Withdrew To Enjoin Peaceful Secondary Pressure

Here, as the court of appeals concluded and as the clear language of Section 4 provides, the Norris-LaGuardia Act withdraws jurisdiction from federal courts to enjoin peaceful secondary picketing. Thus, in arguing that federal courts nevertheless have jurisdiction to enjoin such conduct in a rail labor dispute to enforce the Railway Labor Act, petitioners and *amici* in essence are asserting that Section 4 of the anti-injunction Act has been repealed by the Railway Labor Act. While the 1934 Railway Labor Act amendment legislation [25] contained in Section 8 of that Act a provision that: "All Acts or parts of Acts inconsistent with the provisions of this Act are hereby repealed" (48 Stat. at 1197), neither the Norris-LaGuardia Act itself nor Section 4 thereof was designated as being repealed. Thus, if the federal courts now have jurisdiction to enjoin peaceful secondary pressure in rail disputes, it must be because the Railway Labor Act, or some other federal labor statute, has impliedly repealed Section 4 of the Norris-LaGuardia Act.

However, as this Court has noted on many occasions before, repeals by implication "are not favored" (*e.g.*,

[25] Pub. L. No. 442, 73d Cong., 2d Sess., ch. 691, 48 Stat. 1185 (1934).

Morton v. Mancari, 417 U.S. 535, 549 (1974)) and will not be found to exist unless the intention of the legislature to repeal is clear and manifest. *Watt v. Alaska*, 451 U.S. 259, 267 (1981). Moreover, federal courts "must read the statutes [which are supposedly in conflict] to give effect to each if we can do so while preserving their sense and purpose." *Id.* Those admonitions are especially applicable here where petitioners are seeking an injunction to prevent peaceful picketing as an integral part of self-help in a labor dispute where self-help is permissible, for the Norris-LaGuardia Act was enacted to prevent just such injunctions by removing the courts from the "labor injunction business."

While this Court has held before that the Norris-LaGuardia Act does not deprive the federal courts of jurisdiction to enjoin compliance with various mandates of the Railway Labor Act, *e.g.*, *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957), it has emphasized that "the policy of the [Norris-LaGuardia] Act suggests that the courts should hesitate to fix upon the injunctive remedy for breaches of duty owing under the labor laws unless that remedy alone can effectively guard the plaintiff's right." *IAM v. Street*, 367 U.S. 740, 773 (1961). Accommodating the two Acts requires both that the courts preserve "the obvious purpose in the enactment of each statute" (*Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, *supra*, 353 U.S. at 40) and that the strictures of the anti-injunction Act *not* be disregarded where an injunction would strip "labor of its primary weapon without substituting any reasonable alternative." *Id.* at 41; *compare*, *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397 (1976), *with*, *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235 (1970). Finally, there must be a clear and definite obligation in the Railway Labor Act which Congress intended the courts to enforce, least the vagueness of the policy being enforced provides a "cover for free-wheeling judicial interference in labor relations of the sort that called forth the Norris-LaGuardia in the first

place." *Chicago & North Western Ry. v. UTU*, 402 U.S. 570, 583 (1971).[26]

Here, both petitioners and *amicus* NRLC recognize that not all forms of pressure against non-disputant carriers are "secondary" under Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), and, thus, would be subject to being banned by their construction of the Railway Labor Act. *See*, *Amicus* Brief at 25-26. Indeed, Section 8(b)(4) does not contain a "sweeping prohibition" of secondary conduct. *Carpenters, Local 1976 v. NLRB*, 357 U.S. 93, 98 (1958). And, as this Court noted in its *Jacksonville Terminal* decision:

> No cosmic principles announce the existence of secondary conduct, condemn it as evil, or delimit its boundaries. These tasks were first undertaken by judges, intermixing metaphysics with their notions of social and economic policy. And the common law of labor relations has created no concept more elusive than that of "secondary" conduct; it has drawn no lines more arbitrary, tenuous, and shifting than those separating "primary" from "secondary" activities.

394 U.S. at 386-87. Nevertheless, petitioners and *amicus* NRLC urge this Court to engage in just such an exercise in this case because, they assert, the dividing line between "primary" conduct and the conduct at issue here is so clear. While respondents disagree with petitioners' valuation of the Chessie's conduct, that disagreement is immaterial, because, as this Court noted in the *Jacksonville Terminal* case, in view of the uncertainties as to the dividing line between pure secondary conduct

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[26] Petitioners reliance on *Brotherhood of Railway Clerks v. Florida East Coast Ry.*, 384 U.S. 238 (1966), to authorize an accommodation is misplaced, for the *Florida East Coast* case involved the partial suspension of Section 2 Seventh of the Act, 45 U.S.C. § 152 Seventh, to permit effective self-help by a carrier (384 U.S. at 245-46), and not the limitation of a carrier's self-help remedies.

and primary activities, and because Congress has given no clear standards with which to judge this division, federal courts are incompetent to attempt to draw any line between primary and secondary activity. 394 U.S. at 392-93.

If petitioners' and *amicus* NRLC's views were adopted and federal courts were authorized to decide which form of self-help was permissible as "primary" and which form was enjoinable as "secondary," federal courts could once again bring to bear their own socio-economic views of what conduct is proper and what is not. Such an extensive intrusion of the federal courts in developing the public policy of permissible forms of self-help in a labor dispute, respondents submit, is exactly what Congress sought to prevent by enacting Section 4 of the Norris-LaGuardia Act. Since Congress has not provided in the Railway Labor Act (envisioned by petitioners and *amici*) a clear ban on secondary activity with specific standards, it would be improper, respondents respectfully submit, for this Court to authorize federal courts to enter into an area from which Congress has declared they must leave and never return.

B. Peaceful Secondary Pressure In A Pure Rail Labor Dispute May Not Be Enjoined Because It Is Protected Unregulated Activity

Construing the Railway Labor Act's silence as to what forms of self-help are available in this case as supporting their view of the Act, petitioners assert that the Act's structure, its purposes and the status of secondary pressure in 1926 all indicate that Congress intended to prohibit secondary pressure when it enacted the Railway Labor Act in 1926. Respondents disagree, for what petitioners fail to appreciate is that the Railway Labor Act was an agreement between rail labor and management, adopted by Congress, to provide procedures to resolve disputes by conference, negotiation, mediation and voluntary arbitration so that self-help by either side would be unnecessary. The Act did not address the forms of self-

help which were available to the parties once the Act's processes proved unsuccessful, because the Act was negotiated on the premise that the right to engage in self-help existed, but that this right should be held in abeyance while the Act's procedures were being utilized in an effort to resolve the dispute. *Hearings on H.R. 7180 before House Committee on Interstate and Foreign Commerce* [hereinafter, "*House Hearings*"], 69th Cong., 1st Sess. at 92-93 (1926);[27] *see also, Id.* at 17 (Mr. Richberg explained that one of the purposes of an emergency board was that the public might be informed as to who was in the wrong "if these differences went on to conflict"). Since the Railway Labor Act did not create the right to self-help, there was no need for that law to define its parameters.

To argue, as petitioners do, that the Act went further and adopted, as an essential feature of the legislation, this Court's construction of Section 20 of the Clayton Act in the *Duplex* case[28] is to strain credulity, for it

[27] That the Railway Labor Act must be viewed as merely suspending temporarily the right to self-help is clear from the testimony of rail labor's chief spokesman, Mr. Donald R. Richberg, when he explained to Congress the intent of the agreement:

> Now, then, when you come to the creation of an emergency board [and its status quo requirement] . . . I want to say—and no one can deny this—that in the history of industrial controversies in this country this is the only case where the employees of an entire industry, properly represented, have come before Congress with the accompanying agreements of employers of that industry, have asked that the law be written to preserve peace in the industry, and at the same time have expressed their willingness to have written into that law that during the period of an unsettled controversy, when investigation and report is being made thereon, the conditions shall remain unchanged [i.e., no strikes or unilateral changes].

House Hearings at 93.

[28] Petitioners refer to various statements of Mr. Richberg to argue that the 1926 Act was intended by the parties to preserve the existing law of conspiracy. Pet. Brief at 13 n.12. That reliance is misplaced, for Mr. Richberg was referring to a provision proposed by a business representative that would have made a strike in violation of Section 10's status quo period an unlawful act.

is absurd to allege that rail labor would have knowingly acquiesed in such a constriction of its available self-help remedies when it was, along with all organized labor, actively seeking to have Congress overrule the *Duplex* case and similar improvident injunction precedents. *See*, 75 Cong. Rec. 4618-20 (1932) (Remarks of Sen. Blaine); *Id.* at 5499, col. 2 (Remarks of Rep. Beck); *House Hearings* at 92 (Testimony of D. R. Richberg speaking of "club of the law that he [*i.e.*, employee] feels has been unjustly invoked by the Government"). Moreover, that argument on petitioners' part ignores the fact that all forms of peaceful picketing and sympathy strikes involve fundamental and constitutionally protected rights which should not be viewed as being restrained absent a clear congressional intent to the contrary. *E.g., AFL v. Swing*, 312 U.S. 321 (1941); *RF&P* case, *supra*, 795 F.2d at 115; *accord, NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

Contrary to petitioners' and *amicus* NRLC's assertions, it was not generally conceded in 1926 that secondary pressure tactics in the rail industry were unlawful, for even though such conduct was often enjoined, rail labor and all of labor along with numerous supporters in Congress and elsewhere, were asserting that working men had the right to engage in such concerted activity for their mutual aid and protection. *See*, 75 Cong. Rec. 4618-20 (1932) (Remarks of Sen. Blaine). Even before the rail industry was heavily unionized by the end of World War I,[29] rail strikes frequently involved extensive sec-

[29] "Eighty percent of eligible train service employees and 20 percent of other railway workers were union members just before the period of Federal control [beginning in 1917]. In 1920, at the end of public operations, these figures had increased to 90 percent for train service workers and 80 for the others." L. A. Lecht, EXPERIENCE UNDER RAILWAY LABOR LEGISLATION at 32 (Columbia Univ. Press. 1955) (footnote omitted).

ondary activities which took many forms, including concerted refusals to handle cars destined to or coming from the struck carrier,[30] and sympathy strikes by employees of other rail carriers.[31] While these actions were frequently enjoined, as were massive rail strikes in general, [32] it was recognized by the aftermath of the American Railway Union's Pullman strike in 1894 that rail strikes, even if initially caused by a localized event, had the tendency to become general rail strikes because of the high degree of cooperation and dependence among employees and railroads in the industry.[33] Indeed, the cooperation and high-dependence on each other was not limited to rail labor, but rather, originated with the railroads themselves.[34]

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[30] Secondary boycotts in the rail industry may be traced to "Rule 12" of the Brotherhood of Locomotive Engineers which was adopted in 1890 and required brotherhood members to refuse to handle cars of a struck carrier. *See, Toledo, A.A.&N.M.Ry. v. Pennylvania Comm., supra,* 54 Fed. at 733. Such boycotts were used by all crafts and industries by the early 1900s. S. Stromquist, A GENERATION OF BOOMERS at 48-99 (Univ. of Illinois Press 1986) (Galley proofs).

[31] S. Stromquist, A GENERATION OF BOOMERS, *supra* note 30 at 269. Mr. Stromquist also describes as one form of sympathy action the high incident of "Q. colic," a "mysterious illness" which employees of the non-struck railroads developed during a strike against the "Q"—*i.e.*, the Chicago, Burlington & Quincy R.R.—in 1888. *Id.* at 213.

[32] *See,* G. Eggert, *supra,* at 238-39.

[33] For example, the "Switchmen's Strike of 1920" began when a yard conductor, who was also a union officer, was dismissed and about 700 members of the Chicago Yardmen's Association left their jobs in sympathy on various roads in Chicago. H. D. Wolf, THE RAILROAD BOARD at 103 (Univ. of Chicago Press. 1927).

[34] Railroads have for a long time engaged in cooperative actions in connection wtih labor relations; these actions included, before 1900, strike insurance plans, general manager associations, blacklisting of employees for striking, agreements on wage and rule changes, and plans to provide replacement employees for each other in the event of strikes. S. Stromquist, A GENERATION OF BOOMERS, *supra*, note 30 at 229-66. With the exception of blacklisting, these forms of cooperation continue today.

While, as explained above at pages 17-20, Congress unsuccessfully sought in 1914 to immunize secondary acitvity by enacting the Clayton Act, it is clear that by 1926 when Congress adopted the Railway Labor Act, the pressure to reassert the original purpose of the Clayton Act was mounting. By 1932 that pressure had reached such a level that Congress enacted the Norris-LaGuardia Act which this Court has held "reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act." *United States v. Hutcheson, supra,* 312 U.S. at 236; *see, H. A. Artists & Assoc., Inc. v. Actors Equity Assn.,* 451 U.S. 704, 715 (1981). That Act clearly immunized peaceful secondary pressure in any labor dispute which was subject to federal regulation. *National Woodwork Manufacturers Assoc. v. NLRB, supra,* 386 U.S. at 622-23. Thus, when the Railway Labor Act was modified in 1934 and Sections 1 through 6 were reenacted, the law of self-help was clear and secondary pressure was permissible. Respondents submit, it is Congress' intent in 1934 which governs here.

Ignoring the manner in which congressional regulation of injunctions to restrain permissible forms of self-help developed separately from federal regulation of the collective bargaining process itself, petitioners and *amicus* NRLC assert that Congress' intent to prohibit secondary pressure in the rail industry is evidenced by the fact that for sixty (60) years before the BMWE-MEC/PT strikes, it was recognized by the industry that secondary pressure was not available in rail labor disputes. *E.g.*, Pet. Brief at 24; *Amicus* NRLC Brief at 27. That argument, respondents respectfully submit, is without merit factually.

What petitioners and *amicus* fail to take into account is that between 1926 and 1947 when the Taft-Hartley

Act was enacted,[35] the Railway Labor Act was extremely successful in preventing rail strikes. Between 1926 when the Act was initially enacted and 1932 when the Norris-LaGuardia Act was enacted, there were only two strikes in the rail industry. 6th Annual Report of U.S. Board of Mediation at 1 (1932). One of those strikes was of a few hours duration in 1928 in New York City when Railway Express drivers engaged in an unauthorized strike. *Id.* The second began in 1929 when employees on the Toledo, Peoria & Western Railroad struck; that strike, the Board of Mediation noted, "did not interrupt interstate commerce." 4th Annual Report of U.S. Board of Mediation at 1 (1930). A similar record, albeit not as dramatic, was achieved by the Act between 1932 and 1947. *E.g.*, 8th Annual Report of National Mediation Board at 1-2 (1941). Due to this low level of strike activity, it is virtually impossible to allege that the industry clearly believed sympathy strikes were unlawful.[36]

[35] Pub. L. No. 101, 80th Cong., 1st Sess., 61 Stat. 136 (1947).

[36] In fact, the available evidence indicates that sympathy strikes were accepted as a potential aspect of rail strikes in the early years of that Act, for during this period, the mediation boards routinely recommended the creation of emergency boards whenever a strike date had been set at the unsuccessful conclusion of the Act's non-emergency board processes for resolving major disputes, even if the carrier involved was a small switching or short line. *E.g.*, Emergency Board No. 42, created September 23, 1946 (Utah Idaho Central R.R.—121 mile line); Emergency Board No. 60, created April 10, 1948 (Aliquippa & Southern R.R.—industrial switching railroad). The reason for the boards' policies in so freely recommending the creation of emergency boards, respondents respectfully submit, may be seen from the following quotation from the 1st Annual Report of the NMB at 30 (1935):

> One of these cases [in which board intervened] involved a threatened strike of train-service employees on the Pacific Electric Railway, a subsidiary of the Southern Pacific lines. There were some threats also of sympathetic actions by employees on other railroads in southern California.

Relying upon the structure of the Act, petitioners and *amicus* NRLC seek to read into the Act a ban on secondary picketing by asserting that the Act was intended to deal comprehensively with all railway labor disputes, and that since the Act deals solely with disputes between a carrier and its employees, the statute cannot be read as contemplating or condoning secondary activity. Respondents respectfully submit that petitioners' and *amicus*' arguments are without merit, for those arguments ignore the fact that the right to engage in secondary activity in this case does not arise from a dispute between the BMWE and petitioners. Rather, secondary activity is an integral part of the BMWE's "self-help arsenal" for use against MEC and PT. *Consolidated Rail Corp. v. BMWE*, *supra*, 792 F.2d at 304. Thus, it is immaterial and, indeed, entirely logical, that the Railway Labor Act does not provide a mechanism to allow petitioners to require appellee BMWE to bargain with them over whether the union can resort to secondary pressure in its disputes with MEC/PT. What is important is that the Act provides a mechanism to resolve the primary dispute and, if successful, that process will prevent secondary activity and interruptions to commerce.[37]

Finally, petitioners' belief that secondary activity is prohibited by the Railway Labor Act is directly contrary

[37] *Amicus* NLRC relies on Section 2 First of the Act to assert that respondent BMWE owes a duty to all other carriers on which it represents employees not to engage in secondary pressure against them. There are, however, two problems with this argument. First, Section 2 First requires rail labor to exert every reasonable effort to resolve disputes with a carrier over a "dispute between the carrier and the employees thereof." 45 U.S.C. § 152 First. As explained above, respondents secondary activity does not arise out of a dispute with petitioners within the meaning of Section 2 First. And second, *amicus*' argument proves too much for it would forbid all forms of sympathy strikes, including sympathy strikes with the primary employer by other employees of that carrier. Neither petitioners nor *amicus*, by concentrating on secondary activities, have, or could validly, raise such an argument in view of the extensive history of such sympathy strikes in this industry.

to this Court's conclusion in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., supra*, that the Railway Labor Act does not prohibit any form of peaceful picketing, whether characterized as primary or secondary. In its *Jacksonville Terminal* decision, the Court addressed the question of whether a State may prohibit a rail union from engaging in secondary activity and it answered that question in the negative because it concluded that such conduct was protected by the Railway Labor Act. That conclusion controls and rejects both petitioners' and *amicus*' efforts to outlaw secondary picketing.

Jacksonville Terminal arose out of the picketing of the Jacksonville Terminal in the same strike which was involved in the Fifth Circuit's *Atlantic Coast Line* case, but unlike the factual situation presented to the Fifth Circuit, the *Jacksonville Terminal* case involved picketing of solely the Terminal's facility.[38] That picketing was enjoined by a Florida state court because it found that it was a "secondary boycott illegal under state law. . . ." 394 U.S. at 374. After holding that state law was preempted by the Railway Labor Act, this Court drew upon labor policies evidenced by the National Labor Relations Act and concluded that the right of self-help protected by the Railway Labor Act "includes peaceful 'primary' strikes and nonviolent picketing in support thereof, . . . and that it cannot categorically be said that *all* picketing carrying 'secondary' implications is prohibited. . . ." 394 U.S. at 390 (emphasis in original). At that point, the Court then considered:

> [W]hether, under the present framework of congressional legislation, this Court should undertake precisely to mark out which of the petitioners' picketing activities at respondent's premises are federally protected, and therefore immune from state interference, and which of them are subject to prohibition by the State.

[38] The *Atlantic Coast Line* case also involved picketing of a separate yard of the Atlantic Coast Line. 362 F.2d at 651.

394 U.S. at 391. The Court answered that question by stating: "We believe that such a course would be a wholly inappropriate one for us to take in the absence of a much clearer manifestation of congressional policy than is to be found in existing laws." *Id.*

In support of that conclusion, the Court observed:

> [E]ven on the unjustified hypothesis that all secondary conduct is necessarily wrongful, we would lack meaningful standards for separating primary from secondary activities. Nor do the terms of the Railway Labor Act offer assistance. As we have indicated, the Act is wholly inexplicit as to the scope of allowable self-help.

394 U.S. at 391. Referring to that section of its opinion in which it noted that the facts of the case before it may actually constitute permissible activity under the standards legislated in the National Labor Relations Act (*see* 394 U.S. at 388-90), the court observed that Congress had not given any administrative agency "even colorable authority to perform" the task of adopting National Labor Relations Act principles to rail labor disputes, and it opined that: "The very complexity of the distinctions examined [earlier] . . ., if nothing else, plainly demonstrates that we lack the expertise and competence to undertake this task ourselves." 394 U.S. at 392. That conclusion was buttressed, this Court believed, by the fact that the rail industry was unique and that, if it or the lower federal courts intruded into that world in order to outline the bounds of permissible self-help, the courts might upset the balance of power which Congress, and not the courts, has the right to strike. *Id.*

As the Court then concluded (394 U.S. at 392-93 (footnote omitted; emphasis in original):

> In short, we have been furnished by Congress neither usable standards nor access to administrative expertise in a situation where both are required. In these circumstances there is no really satisfactory

> judicial solution to the problem at hand. However, we conclude that the least unsatisfactory one is to allow parties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute to employ the full range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law. Hence, until Congress acts, picketing—whether characterized as primary or secondary—must be deemed conduct protected against state proscription. . . . Any other solution—apart from the rejected one of holding that *no* conduct is protected—would involve the courts once again in a venture for which they are institutionally unsuited.

More than 17 years have passed since that decision was rendered and Congress has not seen fit to provide the standards which the Court found to be lacking. That silence, respondent BMWE respectfully submits, must be viewed as congressional acquiescence to the view that the Act does not prohibit secondary picketing.

Petitioners attempt to avoid the logical consequences of *Jacksonville Terminal* by asserting that the decision should be construed as holding only that state law is preempted by the Railway Labor Act, and not that secondary activity is permissible under the Railway Labor Act. Pet. Brief at 37. That argument is without merit, for as the Seventh Circuit observed in this case, such a narrow reading of *Jacksonville Terminal* is inconsistent with the type of preemption which this Court concluded was effected by the Railway Labor Act. Pet. App. at 16a-17a. In *Jacksonville Terminal*, this Court did not rely upon the preemption rule expressed in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), to conclude that state court jurisdiction over this issue was preempted. Indeed, the *Jacksonville Terminal* Court concluded that the Florida state courts had the subject matter jurisdiction to consider the Terminal's complaint, but that those courts had to apply federal law because Congress had preempted this area of law. 394 U.S. at 375-82.

The Court then went further and examined that federal law to determine if secondary activity was proscribed. As the court of appeals observed, the *Jacksonville Terminal* Court held that all forms of peaceful secondary picketing are lawful methods of self-help in a Railway Labor Act dispute which "Congress meant to leave unregulated . . . ." Pet. App. at 16a. Consequently, *Jacksonville Terminal* is an example of preemption of substantive law by Congress' deliberately leaving an area of law unregulated.

When that conclusion is coupled with the impact of the Norris-LaGuardia Act on Section 20 of the Clayton Act, it becomes clear that secondary activity in a rail labor dispute is protected, not only from state regulation, but also from federal non-labor regulation. Since Section 20 of the Clayton Act and Section 4 of the Norris-LaGuardia Act immunize secondary pressure from the taint of being unlawful under federal law, the conclusion which is inescapable is that secondary pressure in a rail labor dispute is protected, unregulated activity. As this Court has observed recently:

> . . . " 'Congress has been rather specific when it has come to outlaw particular economic weapons,' " [*Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 143 (1976)] . . . quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 498 (1966), and that congress' decision to prohibit certain forms of economic pressure while leaving others unregulated represents an intentional balance " 'between the uncontrolled power of management and labor to further their respective interests.' " *Machinists*, 427 U.S. at 146, quoting *Teamsters v. Morton*, 377 U.S. 252, 258-59 (1964).

Golden State Transit Corp. v. City of Los Angeles, supra, 89 L.E.2d at 623-24. Here, by not prohibiting secondary picketing in rail labor disputes, Congress must be presumed to have deliberately left such activity as part of labor's arsenal of economic self-help weapons, available

once the right to use self-help is no longer restrained by the Railway Labor Act.

C. Petitioners' View Of The Railway Labor Act Ignores The Structure Of The Act And Would Create Unnecessary Anomalies

While petitioners assert that rail labor's and the Seventh Circuit's view of the Railway Labor Act ignores the structure of the Act and creates absurd results, it is actually petitioners' view of the Act which creates these problems. What petitioners fail to recognize is that the sole reason they may legitimately claim a right to an injunction in this case is to protect the public's right to uninterrupted rail service. However, the Railway Labor Act itself protects that right by providing in Section 10 of the Act that if, in the "judgment of the Mediation Board, [an unresolved dispute should] threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute." 45 U.S.C. § 160. As this case shows, the creation of such an Emergency Board stops the self-help which lead to its creation. Moreover, if at the conclusion of the Emergency Board's status quo period, the underlying dispute still remains unresolved, Congress always has the power to deal with whatever public emergency may be created. *E.g.*, *Wilson v. New*, 243 U.S. 332 (1917). This case, again, is an excellent example of that fact. *E.g.*, Pub. L. No. 99-431, 100 Stat. 987 (1986). In short, whatever public interests are at risk by secondary pressure are already protected both by Section 10 of the Railway Labor Act and by Congress' power to regulate interstate commerce.

This case, however, is also a prime example of the manner in which federal court involvement in rail labor disputes can upset the careful balance of public and

private rights effected by the Railway Labor Act. Here, the President stated when he created the Emergency Board in this case that he waited a substantial period of time in creating that board after being informed of its need because federal court injunctions had delayed respondent BMWE's efforts to picket connecting carriers. White House Press Release of May 16, 1986, reproduced as App. B to Respondents Brief In Support of Petition in this case.[39] In other words, if the federal courts had not intervened, the MEC/PT strike, with its impact on New England and thousands of employees, would have ended at least one month earlier. Thus, while petitioners' parochial interests were aided by their view of the Railway Labor Act, the public's interests were not.

Another glaring problem with petitioners' view of the Railway Labor Act, is that under their view of the law, railroads are the only industry which may appeal to the federal courts for injunctions to enjoin secondary picketing. Even though the National Labor Relations Act, as modified by Section 8(b)(4) of that Act, clearly proscribes forms of pressure against apparent neutrals, only the National Labor Relations Board, and not private parties, may petition a district court to enjoin conduct proscribed by that provision. *See, Jacksonville Bulk Terminals, Inc. v. ILA, supra*, 457 U.S. at 718. Thus, in seeking to read by implication a ban against secondary picketing into the Railway Labor Act, petitioners are also seeking to become the only industry which is totally free of the strictures of the Norris-LaGuardia Act.

Finally, *amicus* NRLC's arguments that rail labor's views of the right to engage in secondary pressure will alter the balance of bargaining power in the industry may be correct. Rather than creating a new balance,

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[39] The NMB recommended the appointment of an Emergency Board between April 11 and 14, 1986. *RLEA v. B&M, supra*, 639 F. Supp. at 1098.

respondents respectfully submit that its view of permissible self-help will restore the balance that existed in the early years of the Act—years when a respect for each side's bargaining power resulted in virtually no strikes of any consequence. But even if rail labor's view of the Act creates a totally new balance, the question posed by petitioners and *amicus* as to the validity of this balance is for Congress, and not the courts, to answer.

CONCLUSION

For the reasons set forth below, respondents BMWE, *et al.*, respectfully submit that the judgment below should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

Statutes Relied Upon

1. Clayton Anti-Trust Act

   A. Section 20, 29 U.S.C. § 52

2. Norris-LaGuardia Act

   A. Section 4, 29 U.S.C. § 104

   B. Section 13, 29 U.S.C. § 113

1. Clayton Anti-Trust Act, Section 20, 29 U.S.C. § 52

A. **Section 20.** That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and persons seeking employment, involving or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

2. Norris-LaGuardia Act, Section 4, 29 U.S.C. § 104

A. **Section 4.** No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act.

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peacefully to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

Section 13, 29 U.S.C. § 113

B. **Section 13.** When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or

concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any part of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

APPENDIX B

Side-By-Side Comparison of Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 and the Second Paragraph of Section 20 of the Clayton Act, 29 U.S.C. § 52

Norris-LaGuardia Act, Section 4, 29 U.S.C. § 104	Clayton Anti-Trust Act, Section 20, 29 U.S.C. § 52
Sec. 4 No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert any of the following acts:	And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communcating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.
(a) Ceasing or refusing to perform any work or to remain in any relation of employment;	
(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;	
(c) Paying or giving to, or withholding from any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;	
(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;	
(e) Giving publicity to the existence of, or the facts in-	

volved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

No. 86-39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, BALTIMORE AND OHIO CHICAGO TERMINAL COMPANY, CHESAPEAKE AND OHIO RAILWAY COMPANY, and CSX TRANSPORTATION, INC.,

Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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IN THE

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No. 86-39

BURLINGTON NORTHERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, BALTIMORE AND OHIO CHICAGO TERMINAL COMPANY, CHESAPEAKE AND OHIO RAILWAY COMPANY, and CSX TRANSPORTATION, INC.,

Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF

The central issue in this case is whether Congress intended to permit railway unions to expand the focus of local disputes by directing secondary picketing against any rail carrier in the country—even those carriers geographically remote from and totally uninvolved in the primary dispute—when it enacted the Railway Labor Act of 1926 ("RLA"), 45 U.S.C. § 151 *et seq.* In deciding this issue in respondents' favor, the court of appeals rejected *any* analysis of the congressional purposes underlying the RLA on the ground that Congress' "goal" in enacting the RLA "is not itself a rule of law" (Pet. App. 14a), even though that goal is codified in the Act. 45 U.S.C. § 151a.

Remarkably, respondents have made absolutely no effort to defend this critical aspect of the court of appeals' decision. Instead, relying largely on selective passages of the legislative history underlying the Clayton Anti-Trust Act, 15 U.S.C. § 12, *et seq.*, respondents argue that secondary boycotts were lawful at the time the RLA was passed and that in enacting the RLA—the legislative history of which respondents almost totally ignore—Congress intended to leave unregulated "all forms of peaceful secondary picketing." Resp. Br. 47.

As demonstrated below, this argument is belied by a review of the pertinent legislative history. Indeed, even the court of appeals concluded that "[n]o doubt th[e] law [in force in 1926] forbade secondary picketing." Pet. App. 13a. Most fundamentally, respondents' argument that *all* forms of secondary pressure by railway unions are lawful under the RLA is flatly inconsistent with Congress' intent in enacting that statute. Respondents do not and cannot explain how Congress—which was expressly concerned in 1926 with preventing potentially devastating nationwide rail strikes—could at the same time have intended to permit secondary picketing to shut down the nation's entire rail system whenever a local single-carrier dispute is not resolved under the RLA's procedures. Nor can respondents explain why the single industry in which Congress was most concerned about the devastating effects of strikes on the national economy would be the *only* one, together with the airline industry, in which pure secondary picketing is allowed. The reason is clear—Congress did not intend to permit respondents to picket neutral carriers and the court of appeals erred in holding that this picketing cannot be enjoined.

1. Respondents primarily argue that the plain language of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, precludes the federal courts from enjoining any secondary picketing against the nation's railroads (Resp. Br. 9-14), and that this Court has recognized that Norris-LaGuardia can preclude the entry of injunctive relief in railway labor disputes. Resp. Br. 25-32. These arguments are, however, largely irrelevant to the proper resolution of this case. Despite the breadth of the language of Norris-LaGuardia, this Court has consistently held that its literal terms must be accommodated with the underlying policies of the RLA and that, notwithstanding Norris-LaGuardia, an injunction may issue to enjoin conduct found to be contrary to the RLA's purposes.[1]

In *Brotherhood of Railroad Trainmen* v. *Chicago River & I.R.R.*, 353 U.S. 30 (1957), the Court enjoined the union from striking over minor disputes that were pending before the National Railroad Adjustment Board, despite the absence of an express prohibition of such self-help in the RLA, because to have permitted such conduct would have been inconsistent with the basic purpose of that Act:

> "We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable." 353 U.S. at 40.

Similarly, in *Chicago & N.W. Ry.* v. *United Transportation Union*, 402 U.S. 570, 582 and n.17 (1971), the Court held that "the congressional debates over the Norris-LaGuardia Act support a construction of that Act permitting federal courts to enjoin strikes in viola-

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[1] Respondents have not cited a single case, and we are not aware of any, in which this Court has applied Norris-LaGuardia to preclude entry of injunctive relief in a labor dispute involving conduct —such as the secondary picketing threatened here—that violated the RLA. *See* Resp. Br. 25-27 relying upon *Jacksonville Bulk Terminals, Inc.* v. *International Longshoremen's Ass'n*, 457 U.S. 702 (1982); *Order of Railroad Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330 (1960); *Marine Cooks & Stewards* v. *Panama Steamship Co.*, 362 U.S. 365 (1960).

tion of the Railway Labor Act in appropriate cases").[2] See also *Brotherhood of Locomotive Engineers* v. *Louisville & N.R.R.*, 373 U.S. 33 (1963); *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 772 (1961) ("We have held that the [Norris-LaGuardia] Act does not deprive the federal courts of jurisdiction to enjoin compliance with various mandates of the Railway Labor Act").

In light of these decisions, the issue here is not whether Norris-LaGuardia should be broadly interpreted or whether it can ever be applied to a railway labor controversy. No one disputes those propositions, but they do not resolve this case. Rather, the issues presented here are (1) whether, in enacting the RLA, Congress intended to permit *all* forms of secondary pressure against any rail carriers, even those having no connection to the primary labor dispute; (2) whether the underlying policies of the RLA are relevant to a judicial determination of the first issue and (3) whether, in enacting Norris-LaGuardia, Congress intended to preclude the entry of injunctions to enforce the RLA's mandates. To its credit, BMWE does not attempt to support the court of appeals' view (which is indeed unsupportable) that in interpreting the mandates of the RLA a court must not consider the policy of the RLA because Congress' "goal" is "not itself a rule of law."[3]

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[2] In *Chicago v. N.W. Ry.*, the Court concluded that RLA Section 2 First creates an enforceable legal obligation to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, despite the absence of specific words defining reasonable efforts in that Act. The Court's decision thus completely undercuts respondents' assertion (Resp. Br. 35-36) that the RLA need not be accommodated unless a specific provision of that Act has been clearly and definitively violated.

[3] As petitioners demonstrated in their opening brief (at 22-27), the court of appeals' view is inconsistent with both the understanding of Congress concerning the judiciary's proper function in fleshing out the RLA's provisions and a long line of decisions in which this Court has looked to the policies and purposes of the Act in formulating specific rules of conduct for rail unions and carriers. Thus, for example, the court of appeals' decision is squarely at odds with this Court's decisions in *Steele* v. *Louisville & N.R.R.*, 323 U.S. 192, 202-03 (1944) and *Chicago & N.W. Ry.* v. *United Transportation Union*, 402 U.S. at 577. In *Chicago & N.W. Ry.*, the Court quoted the statement of the labor spokesman who testified with respect to the RLA:

> "[The RLA] has been written upon the theory, that in the development of the obligations in industrial relations and the law in regard thereto, there is more danger in attempting to write specific provisions and penalties into the law than there is in writing the general duties and obligations into the law and letting the enforcement of those duties and obligations develop through the courts in the way in which the common law has developed in England and America."

Because the RLA resulted from an agreement between management and labor, this Court has recognized "that statements of the spokesmen for the two parties made in the hearings on the proposed Act are entitled to great weight in the construction of the Act." 402 U.S. at 576. Moreover, the view that legislative intent can be ignored is also contradicted by Justice Holmes' observation, "it is not an adequate discharge of duty for the courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." *United States* v. *Hutcheson*, 312 U.S. 219, 235 (1941), quoting *Johnson* v. *United States*, 163 F. 30, 32 (1st Cir. 1908).

2.a. With respect to the two issues they do address, the thrust of respondents' argument is as follows. In enacting the Clayton Act in 1914, Congress intended to immunize secondary picketing by rail unions from federal court injunctions (Resp. Br. 15-20) and that Congress did nothing to change this situation in 1926 when it enacted the RLA. *Id.* at 37-48. Finally, respondents assert that, when Congress passed Norris-LaGuardia in 1932, it intended to remove any doubt concerning the legality of secondary picketing by rail unions. *Id.* at 20-37. Respondents' arguments wholly mischaracterize the legality of secondary picketing by railway unions during the first third of this century and largely ignore the legislative history of the most important of the relevant statutes—the RLA.

No one disputes the fact that during the 1890's federal courts consistently held the use of the secondary boycott to be unlawful when directed against the nation's railroads.[4] In *Thomas* v. *Cincinnati N.O. & T.P. Ry.*, 62 F. 803, 819 (S.D. Ohio 1894), Judge Taft described the illegality of secondary boycotts aimed at railroads in no uncertain terms:

> "Boycotts, though unaccompanied by violence or intimidation, have been pronounced unlawful in every state of the United States where the question has arisen, unless it be in Minnesota; and they are held to be unlawful in England."

Contrary to respondents' assertions (Resp. Br. 15-20), the enactment in 1914 of the Clayton Anti-Trust Act, 15 U.S.C. § 12, *et seq.*, did not change the law concerning secondary boycotts generally, much less in the railroad industry. As Congressman Webb, the spokesman of the House Committee that drafted the bill, explained, "[the bill] was drawn with the careful purpose not to legalize the secondary boycott, and we do not think it does." 51 Cong. Rec. 9652 (1914). Congressman Webb was so certain of this interpretation that he argued against a proposed amendment, which would have exempted the secondary boycott from the limitations on injunctive relief in the bill, as "not necessary." *Id.* at 9653. He later explained his opposition to the proposed amendment:

> "I should vote for the amendment offered by the gentleman from Minnesota if I were not perfectly satisfied that it is taken care of in this section. The language the gentleman reads does not authorize the

[4] *See, e.g., Toledo A.A. & N. M. Ry.* v. *Pennsylvania Co.*, 54 F. 730 (N.D. Ohio 1893); *Toledo A.A. & N. M. Ry.* v. *Pennsylvania Co.*, 54 F. 746, 753 (N.D. Ohio), *app. dism'd sub nom., In re Lennon*, 150 U.S. 393 (1893); *Thomas* v. *Cincinnati N.O. & T. P. Ry.*, 62 F. 803 (S.D. Ohio 1894); *Southern Cal. Ry.* v. *Rutherford*, 62 F. 796, 797 (S.D. Cal. 1894); *United States* v. *Debs*, 64 F. 724 (N.D. Ill. 1894), *pet. for writ of habeas corpus denied sub nom., In re Debs*, 158 U.S. 564 (1895).

> secondary boycott and he could not torture it into any such meaning . . .
>
> "I say again—and I speak for, I believe, practically every member of the Judiciary Committee—that if this section did legalize the secondary boycott there would not be a man vote for it. It is not the purpose of the committee to authorize it, and I do not think any person in this House wants to do it. We confine the boycotting to the parties to the dispute, allowing parties to cease to patronize that party and to ask others to cease to patronize the party to the dispute." *Id.* at 9658.[5]

[5] In support of their claim that the Clayton Act immunized secondary boycotts from federal court injunctions and overruled the federal court decisions of the 1890's enjoining secondary picketing in the railroad industry, respondents cite the remarks of Senator Borah. Resp. Br. 17, 18 n.16. However, the legislative history makes it clear that Senator Borah believed that secondary boycotts should be, and in fact were, unlawful in 1914:

> "[W]e are asked by some to declare that the labor unions may go further [than act against the primary employer] and affirmatively and effectively and with design interfere with or restrain interstate commerce; that while we condemn all other interests and punish if they restrain trade . . . we will except labor unions. This, Mr. President, I can not do . . . .

51 Cong. Rec. 13925 (1914).

Respondents also cite (Resp. Br. 18) the remarks of Senator Ashurst, who listed *Toledo A.A. & N.M. Ry.* v. *Pennsylvania Co., supra*, and *Thomas* v. *Cincinnati, N.O. & T.P. Ry., supra*, as two cases that he apparently believed should be overturned legislatively. What respondents fail to point out is that Senator Ashurst cited over 100 such decisions. 51 Cong. Rec. 13664-666 (1914). The more relevant evidence of legislative intent comes from Congressman Clayton who cited a number of "recognized authorities" that he believed to be *consistent with* the activity permitted under Section 20 of the Clayton Act. Among the cases cited by Congressman Clayton was Judge Taft's opinion in *Toledo A.A. & N.M. Ry.* v. *Pennsylvania Co., supra*, which held that the refusal of union employees of carriers connecting with the primary employer to handle that line's traffic was enjoinable as a violation of the duty to provide service to the struck carrier under the Interstate Commerce Act. *See* H.R. Rep. No. 627, pt. 1, 63d Cong., 2d Sess. 34 (1914); S. Rep. No. 698, 63d Cong., 2d Sess. 30 (1914). Accord-

Congressman Webb's statement that the Clayton Act was not intended to legitimate the secondary boycott was expressly relied upon by this Court in *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 475-477 (1921), when it held a secondary boycott to be violative of the antitrust laws, notwithstanding the Clayton Act.[6] Although Congress may have later intended to reverse the holding of *Duplex Printing* in passing the Norris-LaGuardia Act *in 1932*, this does not change the fact that, at the time of the passage of the RLA *in 1926*, secondary boycotts of rail carriers had clearly and consistently been held to be unlawful. Indeed, respondents have not cited even a single case in which secondary picketing was permitted *in any industry* prior to the enactment of Norris-LaGuardia.[7]

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ingly, Congress did not intend to overrule Judge Taft's decision when it adopted the Clayton Act.

[6] Reviewing the legislative history of the Clayton Act less than seven years after its enactment, this Court found (254 U.S. at 477):

> "[I]t was the opinion of the committee that [the Clayton Act] did not legalize the secondary boycott, it was not their purpose to authorize such a boycott, not a member of the committee would vote to do so; clarifying amendment was unnecessary; the section as reported expressed the real purpose so well that it could not be tortured into a meaning authorizing the secondary boycott. This was the final word of the House committee on the subject, and was uttered under such circumstances and with such impressive emphasis that it is not going too far to say that except for this exposition of the meaning of the section it would not have been enacted in the form in which it was reported. In substantially that form it became law; and since in our opinion its proper construction is entirely in accord with its purpose as thus declared, little need be added."

[7] Respondents have also been unable to point to even a single case prior to 1986 in which any court upheld the right of a railway union to direct secondary picketing at wholly neutral carriers. Respondents attempt to justify this gap by arguing (Resp. Br. 41-42) that between 1926 and 1932 the RLA was successful in preventing all but two rail strikes. This argument is unfounded. In the 60 years since the RLA was enacted there have been over 470 railroad strikes. Cullen, "Strike Experience Under the Railway Labor Act," in

Respondents imply (Resp. Br. 15) that, at the time Congress considered the RLA, there was a sharp division among the states over the legality of secondary boycotts. However, the very source cited by BMWE makes clear that even four years later, in 1930, secondary boycotts were almost universally condemned:

> "The forms of pressure usually characterized as 'the secondary boycott'—a combination to influence A by exerting some sort of economic or social pressure against persons who deal with A—have been condemned by the federal and the Massachusetts courts in a series of instances revealing a great range of versatility. Whether the means of pressure upon a third person be a threat of strike against him, a refusal to work on material of non-union manufacture, an unfair list backed by the show of concerted action and force of numbers, coercion and intimidating measures generally, or merely notice by circularization, banners or publication—the ban of illegality has fallen upon all alike."

F. Frankfurter and N. Greene, THE LABOR INJUNCTION 43 (MacMillan 1930).[8]

In sum, at the time of the RLA's passage, Congress could only have understood that secondary pressure tac-

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Rehmus, *The Railway Labor Act at Fifty*, 197 (1977). The fact that, despite this volume of primary strike activity, prior to 1986 *no court* had ever upheld the right of a railroad union to engage in secondary picketing against wholly neutral carriers, wholly belies respondents' claim that Congress intended to permit such activity.

[8] In support of its argument that all forms of secondary pressure were widely used *and accepted as lawful*, respondents also repeatedly quote from S. Stromquist, A GENERATION OF BOOMERS (Univ. of Illinois Press 1986) (Galley proofs). *See* Resp. Br. 40-41 and nn. 30, 31, and 34. However, this source makes plain that, as of 1895, "[a]ny labor dispute that involved interstate commerce or the mails—and what railroad strike would not—could be enjoined, and the injunction could be enforced by the full, armed might of the United States if not obeyed." *Id.* at 259.

tics were uniformly declared unlawful by the courts. As petitioners explained in their opening brief (at 10-22), the structure, purpose and legislative history of the RLA demonstrate that Congress passed that Act "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein" (45 U.S.C. § 151a). This purpose is wholly inconsistent with the view that Congress, in enacting the RLA, in particular Section 2 First, could have intended to permit a railway union to expand the scope of a localized dispute by engaging in secondary picketing across the country in an effort to shut down the nation's rail system. See also Brief of *Amicus Curiae* The National Railway Labor Conference at 12-16, 26-29 (demonstrating how expansion of local disputes into national railway controversies undermines the structure of labor relations developed in the railroad industry under the RLA).

Respondents have cited nothing in the text of the RLA or its legislative history which would justify a result so clearly contrary to the congressional purpose in enacting the RLA. Respondents baldly assert that, because "the Railway Labor Act did not create the right to self-help, there was no need for that law to define its parameters." Resp. Br. 38. This argument, however, conflicts with this Court's decision in *Brotherhood of Railway & Steamship Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238, 247 (1966), in which the Court invoked "the spirit of the Railway Labor Act" in carefully circumscribing the extent of self-help available to a struck carrier in order to prevent "labor-management relations [from] revert[ing] to the jungle."

Contrary to respondents' arguments, Congress' failure to insert an express prohibition against secondary picketing in the RLA is no evidence of Congress' intent suddenly in 1926 to authorize all forms of secondary pressure which were clearly unlawful up to that time. The fact is that Congress did not expressly legitimate the secondary boycott as a weapon that rail labor could

permissibly use in the limited circumstance where self-help was authorized under the RLA.[9] Accordingly, Congress did not intend to authorize rail labor to enhance its bargaining leverage in a local dispute by engaging in secondary picketing against wholly neutral carriers in order to bring the country's rail service to a halt.[10] The

[9] Indeed, because the *status quo* obligations created by the RLA with respect to major disputes are applicable only to the parties to such disputes (*i.e.*, the primary employer and its employees), any right to self-help authorized under the RLA once the *status quo* ceases to apply is restricted to self-help between the parties to the dispute. *See* Brief of *Amicus Curiae* The National Railway Labor Conference at 23-24.

[10] In attempting to reconcile its view that all forms of secondary pressure by rail unions are lawful with the clear congressional intent underlying the RLA to minimize interference with interstate commerce, respondents point (Resp. Br. 48) to the fact that under Section 10 of the RLA the President can appoint an emergency board to investigate and report concerning a dispute that could "threaten substantially to interrupt interstate commerce." 45 U.S.C. § 160. Alternatively, respondents suggest that "Congress always has the power to deal with whatever public emergency may be created." Resp. Br. 48. However, the fact that Congress can legislate in an area does not provide a basis for a court to ignore Congress' intent in enacting legislation already in effect. Moreover, the fact that under Section 10 of the RLA the President can appoint an emergency board with respect to a dispute threatening essential transportation plainly does *not* reflect endorsement of secondary pressure that is calculated to "shut down the nation's railroad system." Pet. App. 5a. Indeed, the RLA's drafters anticipated that it should be seldom, if ever, necessary for the President to exercise the power conferred upon him to appoint an emergency board." H.R. Rep. No. 328, 69th Cong., 1st Sess. 4 (1926). This expectation is plainly inconsistent with a view that any local dispute can be expanded into a national crisis by means of secondary picketing.

Respondents also claim (Resp. Br. 49) that if petitioners' view of the law is upheld an anomaly would be created insofar as railroading would be the only industry in which private parties (as opposed to the National Labor Relations Board) could seek a federal court injunction against secondary picketing. But, under either interpretation of the RLA, there will be an anomaly created; the one created by petitioners' interpretation, however is fully consistent with the very special position the rail industry and rail-

court of appeals' decision, instead of strictly construing the RLA, extends to the unions a right which for sixty years they did not enjoy.

2.b. A contrary conclusion is not supported by this Court's decision in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969). Respondents argue that the decision is not limited to the issue of whether state courts should be permitted to apply state law in prohibiting self-help activities by rail labor unions, but instead stands for the broad proposition that "*all* forms of peaceful secondary picketing are lawful methods of self-help in a Railway Labor Act dispute." Resp. Br. 47 (emphasis supplied).[11] As petitioners ex-

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way labor legislation have historically enjoyed in this country because of the national interest in the uninterrupted flow of interstate commerce. *See* Pet. Br. 23. Precisely because of that special position, this Court has repeatedly recognized that railroads and airlines may seek injunctions to enforce the RLA and that the Norris-LaGuardia Act must accommodate such actions.

Moreover, the anomaly created by respondents' interpretation of the RLA is wholly at odds with this Court's statement that the RLA should be interpreted consistently with the dictates of the National Labor Relations Act. Pet. Br. 30 and cases cited therein. Respondents do not dispute that their proposed picketing would unquestionably violate Section 8(b)(4), if they were representing employees in any other industry, except the airlines industry. 29 U.S.C. § 158(b)(4).

[11] Respondents' (Resp. Br. 46-47) and the court of appeals' (Pet. App. 16a) effort to interpret *Jacksonville Terminal* more broadly because of the "type of preemption" analysis employed there is misguided. The "type" of preemption to which they refer relates to the unique preemption doctrines under the NLRA which are inextricably linked to facets of that statute which are completely irrelevant to the RLA. Preemption analysis under the NLRA is significantly affected by the fact that there is an administrative agency to interpret that Act and that Congress under the NLRA "has been rather specific when it has come to outlaw particular economic weapons." *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 143 (1976), quoting *NLRB* v. *Insurance Agents, International Union*, 361 U.S. 477, 498 (1960). *See San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). The RLA's statutory scheme is fundamentally different. No agency

plained in their opening brief (at 35-39), such a holding would have gone well beyond the narrow question before the Court in that case and well beyond the common situs picketing involved in that (but not this) case. Moreover, it is not what the Court in that case in fact held.[12]

Further, respondents' argument that every member of this Court believed in 1969 that *all* forms of secondary picketing are permissible under the RLA is flatly belied by the fact that three years earlier four members of the Court voted to overturn the decision in *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir.), *aff'd by an equally divided court*, 385 U.S. 20 (1966), and thus would have *granted* an injunction under federal law against the picketing of a carrier

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administers the Act and self-help measures are not defined. *See Jacksonville Terminal*, 394 U.S. at 391 (RLA "is wholly inexplicit as to the scope of allowable self-help").

In *Jacksonville Terminal* the only issue was whether permitting state courts to enjoin rail union picketing would interfere with Congress' objectives under the RLA, which is a traditional preemption question. *See Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Because the Court found that defining secondary picketing is an inherently difficult task, and one that could lead state courts to enjoin conduct Congress clearly did not intend to prohibit, the Court held that state courts were preempted from issuing injunctions. As the Court itself explicitly stated, "the potentials for conflict . . . and for the imposition of inconsistent state obligations, . . . are simply too great to allow each State which happens to gain personal jurisdiction over a party to a railroad labor dispute to decide for itself what economic self-help that party may or may not pursue." 394 U.S. at 381 (citations omitted). Nothing in that analysis required the Court to hold that all secondary activities are unlawful. To the contrary, the discussion of the complexity of deciding what is secondary picketing implicitly assumed that some secondary picketing must be unlawful.

[12] The Court's summary of its holding clearly shows that it carefully avoided deciding issues beyond those necessary to the disposition of the case. "We have thus far concluded that . . . it cannot categorically be said that *all* picketing carrying 'secondary' implications is prohibited." 394 U.S. at 390 (emphasis in original). If the Court had intended to reach the issue whether *all* secondary picketing was *permitted*, it surely would have said so.

that was partially-owned by the primary employer and that provided services constituting "an integral part of the day-to-day operation of the [primary employer]." 362 F.2d at 651. See Pet. Br. 35 n.40.

It is uncontradicted that Congress' purpose in enacting the RLA was to prevent interruptions to interstate commerce arising from either "major" or "minor" railway labor disputes. Respondents' argument that *all* secondary pressure—including secondary picketing calculated to shut down the nation's railway system—is lawful flies directly in the face of this congressional purpose in enacting the RLA. This Court in *Jacksonville Terminal* did not decide, and indeed said it was not deciding, whether *all* secondary activity was lawful under the RLA. That issue, however, is squarely presented here.[13] The secondary picketing threatened here against wholly neutral common carriers must be held to violate the RLA if Congress' purpose in enacting that statute is to be vindicated.

3.a. Nor is there any merit to respondents' argument that Congress intended the Norris-LaGuardia Act "to apply to *all* labor disputes, including rail disputes, in exactly the same manner." Resp. Br. 23 (emphasis in original). See *Brotherhood of Railroad Trainmen* v. *Chicago River & I.R.R.*, 353 U.S. 30 (1957). There is nothing in the Norris-LaGuardia Act or its history which suggests that it was meant to repeal the RLA or permit local labor disputes to be expanded into nationwide disputes in violation of the RLA. To the contrary, in the congressional debates that led to the Act's passage, several Congressmen expressed concern that the proposed statute might prevent the federal courts from enjoining strikes in the rail industry with disastrous effects on the free flow of interstate commerce. The legislative debate makes clear that Congress understood that the Norris-LaGuardia Act would not permit labor disputes in the railroad industry, to bring interstate commerce to a halt

[13] *See* note 12, *supra*.

because such disputes are governed by, and would be resolved under, the comprehensive provisions of the RLA:

> "Mr. LANKFORD of Virginia . . . Does this make it possible for lack of an injunction to tie up railroads and prevent them from transporting milk, for instance?
>
> "Mr. LAGUARDIA: I think the gentleman was a Member of the House in 1926?
>
> "Mr. LANKFORD of Virginia. No.
>
> "Mr. LAGUARDIA. We then passed the railroad labor act and that takes care of the *whole labor situation* pertaining to the railroads. They could not possibly come under this for the reason that we provided the machinery there for settling labor disputes.
>
> • • •
>
> "Mr. LANKFORD of Virginia. It does not apply to the transportation of milk or other necessities that go in interstate commerce?
>
> "Mr. LAGUARDIA. Interstate traffic is *entirely covered* in the railroad labor act of 1926." 75 Cong. Rec. 5499 (1932) (emphasis added).

As Representative LaGuardia (one of the principal sponsors of the Act) explained, in response to the expressed concerns of Representative Beck that the proposed bill would permit a rail labor dispute to "paralyze interstate transportation from the Atlantic to the Pacific" (75 Cong. Rec. 5472 (1932)):

> "The bill, I will say to the gentleman from Pennsylvania, in no way repeals the railroad labor act, and three-fourths of the argument of the gentleman from Pennsylvania was directed against interference with transportation in interstate commerce; and the gentleman is a sufficiently good lawyer to know the provisions of the railroad labor act, which was passed in 1926.
>
> "Was it to create fear; was it to create prejudice? I will not charge that to the gentleman from Pennsylvania; but it was most unbecoming for a lawyer of his standing to direct his fire entirely on the interruption of transportation of interstate traffic,

when *there is another law which will take care of that situation.*

"Gentleman, this bill does not—and I can not repeat it too many times—this bill does not prevent the court from restraining any *unlawful act.*" *Id.* at 5478 (emphasis added).

Although a broad amendment was offered by Representative Beck that, among other things, would have expressly permitted courts to enjoin labor disputes that obstruct interstate commerce, Representative LaGuardia urged its rejection because the amendment was unnecessary in light of the RLA and the penal provisions protecting interstate commerce.[14]

"Mr. LAGUARDIA . . . The amendment offered by the gentleman from Pennsylvania brings in the public a purely penal provision for which there is adequate law and which it is not intended to repeal by the provisions of this bill . . . The public is fully protected by penal and other statutes not contemplated to be repealed by this bill."

Following Representative LaGuardia's explanation, the proposed amendment was rejected. *Id.* at 5503.

Thus, the legislative history of the Norris-LaGuardia Act discloses that Congress viewed that Act to be of limited application to the rail industry as a result of the comprehensive provisions of the RLA and the interstate commerce statutes.[15] The congressional debates reflect

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[14] These penal provisions protecting the free flow of interstate commerce, to which Congressman LaGuardia made reference, had been the basis for the injunctions issued against the secondary boycotts of the railroads in the cases cited in note 4, *supra.*

[15] Respondents argue (Resp. Br. 22) that "the Senate report makes clear by referring to rail labor throughout its report, [that] rail labor was included within the class of persons entitled to invoke the protections of the [Norris-LaGuardia] Act," citing S. Rep. No. 163, 72d Cong., 1st Sess. at 10-12 (1932). However, contrary to the implication created by respondents, the Senate Report only refers to rail labor when it discusses *Texas & N.O.R.R.* v. *Brotherhood of Railway & Steamship Clerks,* 281 U.S. 548 (1930),

Congress' understanding that secondary picketing in the rail industry was already unlawful under the RLA and, hence, could be enjoined under Norris-LaGuardia [16] so as to prevent any interference with interstate commerce.

3.b. Respondents repeatedly argue that petitioners seek to authorize federal courts to "examine the motives for union conduct" (Resp. Br. 29) or the likely efficacy of secondary pressure in particular cases in contravention of Congress' intent in enacting Norris-LaGuardia. Resp. Br. 13, 29-31, 37. This argument completely mischaracterizes the nature of the issue before the Court in this case. Petitioners do not argue that BMWE's threatened secondary picketing should be enjoined because such activity would be ineffective or stems from a miscalculation on respondents' part. Quite to the contrary, it is clear that the ability of a railway union to enlarge the scope of a local dispute and thereby bring the nation's railway system to a halt would greatly enhance the leverage enjoyed by that union. Rather, petitioners submit that, in enacting the RLA, Congress intended to continue the prohibi-

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in which this Court held enforceable and constitutional the provisions of the RLA guaranteeing railway employees the right of self-organization free from interference, influence or coercion. The Senate Report notes that:

"this right of employees, written into the railway labor act, is the same right which is affirmed . . . . in section 2 [of the Norris-LaGuardia Act] . . . . Therefore, the decision of the Supreme Court . . . sustaining the constitutionality and the enforceability of this right of employees under the railway labor act, directly and conclusively sustains the constitutionality of the declaration of policy in the proposed bill . . . ."

S. Rep. No. 163, 72d Cong., 1st Sess. at 11-12 (1932). Thus, far from evidencing any congressional intent somehow to override the RLA in enacting Norris-LaGuardia, the language in the Senate Report merely indicates that Congress was concerned about the constitutionality of self-organization provisions. It therefore looked to identical provisions which the Supreme Court had already held constitutional. It found one in the RLA.

[16] Norris-LaGuardia permits an injunction to issue when the federal court finds "[t]hat unlawful acts have been threatened and will be committed unless restrained." 29 U.S.C. § 107(a).

tion against secondary pressure directed at wholly neutral, and therefore innocent, rail carriers, such as petitioners, and that, in enacting Norris-LaGuardia, Congress did not, intend to emasculate this prohibition.

Contrary to respondents' argument, the application of the RLA in this case does not even remotely call for highly subjective or "free-wheeling judicial interference in labor disputes." Resp. Br. 29. Petitioners carry on no joint operations and maintain no joint facilities with the employers (Maine Central Railroad and Portland Terminal Company). This case involves no mutual aid pact, no strike fund and no common situs picketing—facts which can be determined objectively. This case simply involves a railway union expanding the focus of its pressure nationwide by picketing totally neutral rail carriers in order to enhance its leverage over the struck railroad, the railroad industry and Congress. Such secondary activity directed at wholly neutral railroads merely carrying out their duties as common carriers to interchange traffic (See 49 U.S.C. § 10742) is plainly contrary to Congress' intent in passing both the RLA and Interstate Commerce Act.

Application of the "substantial alignment" doctrine is an objective exercise, which merely requires a court to inquire if the struck carrier receives extraordinary services or other aid (such as strike insurance) from the secondary carrier. If so, then the secondary carrier is not, in fact, a neutral with respect to the labor dispute. *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R.*, 362 F.2d 649, 651 (5th Cir.), *aff'd by an equally divided court*, 385 U.S. 20 (1966). As respondents acknowledge (Resp. Br. 27 n.21), the doctrine is directly analogous to the "ally doctrine" which is routinely applied under the National Labor Relations Act to identify third-party employers against whom picketing or other activity may lawfully be directed. "The Court has in the past referred to the NLRA for assistance in construing the Railway Labor Act." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. at 383. Both the "substantial alignment" and "ally" doctrines *preserve* labor's right to picket by permitting such activity to be extended beyond the primary employer when a secondary employer has "joined the fray" and thus, in effect, assumed a role in the primary dispute.

Application of the substantial alignment doctrine is thus wholly consistent with national labor policy. By contrast, as explained in petitioners' opening brief (at 29-35), unlimited secondary picketing against wholly neutral third parties is flatly inconsistent with national labor policy. Significantly, respondents have not argued to the contrary nor explained why Congress could have intended to leave two of the nation's most strike-sensitive industries—the railroads and airlines—as the only ones unprotected from the acknowledged ravages of secondary picketing. That Congress would do so is doubly improbable because the railroad and airline industries are not only the two most strike-sensitive, they are also the two for which Congress has provided their own labor statute specifically for the purpose of reducing the likelihood of strikes in those industries.

There are no facts in this case that could support a holding that any petitioner has aligned itself with Maine Central ("MEC") and Portland Terminal ("PT") so as to make it a primary disputant in the controversy between BMWE and those New England railroads.[17] The

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[17] Respondents argue that "the Chessie system exercised its discretion since the strike to provide other forms of assistance to the primary disputants' rail system." Resp. Br. 6. This assertion, which conflicts with the findings of the court of appeals (Pet. App. 5a) and the district court (*id.* at 35a-36a), is false for several reasons.

First, as respondents acknowledge (Resp. Br. 6), the Chessie system does not interchange traffic with MEC or PT, but only with the D&H, a sister company that, as the district court found, was not a primary disputant. Pet. App. 36a. No evidence was presented by respondents that any of the Chessie system companies ever provided "assistance" to MEC or PT. *See, e.g.*, Jt. App. 14, 22, 31, 35-36. Second, the record shows, as the district court found, that

activity threatened here—secondary pressure calculated to shut down the nation's railroad system—strikes at the heart of Congress' purpose in enacting the RLA. Accordingly, Norris-LaGuardia should not be held to bar entry of an injunction necessary to vindicate the clear purpose of the RLA.

CONCLUSION

For the foregoing reasons and those stated in petitioners' opening brief, the judgment of the court of appeals should be reversed.

"the minimal relationship between B&O/C&O and D&H has, in fact, been curtailed as the strike of MEC/PT progressed." Pet. App. 36a. The Chessie system ceased providing D&H with locomotives under a long-established run-through agreement because of the strike. Jt. App. 15-16. It also ceased providing D&H with interchange services at the Buffalo interchange. Jt. App. 21-22. On one occasion, five locomotives were provided to D&H to resolve an emergency situation caused by congestion in the B&O Philadelphia yard. Jt. App. 17-18. No additional locomotives were provided D&H after that one instance. Jt. App. 20. Third, the record shows that the Chessie system refused requests that it received from representatives of MEC/PT to provide the names of furloughed Chessie employees. Jt. App. 33-34. Thus, there is no factual basis for claiming that the Chessie system enmeshed itself in the MEC/PT dispute with BMWE or could be characterized as substantially aligned with or an ally of the primary disputants.

Respectfully submitted,

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No. 86-39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY,
MISSOURI PACIFIC RAILROAD COMPANY,
THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,
BALTIMORE AND OHIO RAILROAD COMPANY,
BALTIMORE AND OHIO CHICAGO TERMINAL COMPANY,
CHESAPEAKE AND OHIO RAILWAY COMPANY,
AND CSX TRANSPORTATION, INC.,
Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF AMICUS CURIAE THE NATIONAL RAILWAY LABOR CONFERENCE

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QUESTIONS PRESENTED

1. Whether the Railway Labor Act prohibits a rail union from threatening or undertaking economic action against a carrier when the union has not exhausted the Act's major dispute resolution procedures with respect to that carrier.

2. Whether the Railway Labor Act prohibits a rail union from threatening or undertaking nationwide economic action against railroad industry carriers when the union has not exhausted the Act's major dispute resolution procedures in national handling.

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Supreme Court of the United States
OCTOBER TERM, 1986

No. 86-39

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INTERESTS OF AMICUS CURIAE

Pursuant to Rule 36 of the Rules of the Supreme Court,[1] the *Amicus Curiae*, the National Railway Labor

[1] Letters of consent from all parties to the filing of this brief have been filed with the Clerk of this Court.

Conference, files this brief in support of petitioners, Burlington Northern Railroad Company, *et. al. Amicus Curiae* adopts and supports the arguments of the petitioners that federal courts may, consistent with the Railway Labor Act [2] and the Norris-LaGuardia Act,[3] enjoin secondary economic action in rail disputes. This brief supplements petitioners' argument for reversal of the decision below,[4] and focuses exclusively on whether the Railway Labor Act should be interpreted as prohibiting economic action by a rail union against neutral, secondary carriers after exhaustion of the Act's procedures with respect to a single, primary carrier.

The National Railway Labor Conference (hereinafter "NRLC" or "Conference") is the multiemployer representative of its member railroads both in national collective bargaining with unions pursuant to the Railway Labor Act and in regard to other labor-management problems that are of concern to the railroads generally. Most of the nation's Class I railroads are members of the Conference and authorize the Conference to represent their interests in multicarrier, national collective bargaining. The Burlington Northern Railroad Company and other petitioner carriers are members of the NRLC. The union action which precipitated this and related litigation, the April 8, 1986, telegram threat of a nationwide work stoppage by the President of the Brotherhood of Maintenance of Way Employes (hereinafter "BMWE") to the Association of American Railroads, was directed towards carrier members of the NRLC.[5]

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[2] Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* (1982).

[3] Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.* (1982).

[4] *Burlington Northern R. R. v. BMWE*, 793 F.2d 795 (7th Cir. 1986).

[5] *See Brotherhood of Maintenance of Way Employes v. Association of American Railroads*, 639 F. Supp. 220 (D.D.C.), *affirmed sub nom. Central Vermont Ry. v. BMWE*, 793 F.2d 1298 (D.C. Cir. 1986); *Consolidated Rail Corp. v. BMWE*, slip op. No. 86-0318T (W.D.N.Y. April 6, 1986), *vacated*, 792 F.2d 303 (2d Cir. 1986); *Richmond, Fredericksburg & Potomac R.R. v. BMWE*, slip op. No. 86-3544 (4th Cir. April 12, 1986), *vacated*, 795 F.2d 1161 (4th Cir. 1986); *Norfolk and Western Ry. v. BMWE*, 795 F.2d 1169 (4th Cir. 1986).

This case arose originally from a bargaining dispute between the BMWE and two small railroads, the Maine Central Railroad (hereinafter "MEC") and its subsidiary, the Portland Terminal Company (hereinafter "PT"). The BMWE represents those carriers' maintenance of way employees, and the dispute related to the rates of pay, rules, and working conditions applicable to that group of employees. The MEC/PT dispute began with negotiations in 1984 which, after exhaustion of the Railway Labor Act major dispute procedures, lead to a lawful strike by the BMWE against MEC/PT beginning on March 3, 1986. *See* Report To The President By Emergency Board No. 209 (June 20, 1986) (hereinafter "Report No. 209"). It was the extension of the BMWE-MEC/PT work stoppage to petitioners, and other NRLC carriers who are "strangers" to the MEC/PT dispute, 793 F.2d at 798, that gave rise to this litigation.[6]

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[6] The BMWE's April 8, 1986 threat of a nationwide work stoppage never came to full fruition. During early April, 1986, BMWE conducted picketing and work stoppages against several NRLC carriers, but those actions were enjoined by several courts prior to the realization of their full impact. On May 15, 1986, the United States Court of Appeals for the Second Circuit stayed a district court injunction applicable to the Consolidated Rail Corporation. The BMWE promptly struck and/or picketed Conrail at eighty locations across its rail system. Union agents picketed several Conrail facilities and, even where there was no picketing, Conrail employees represented by the BMWE responded to the Union's call to pressure Conrail by engaging in work stoppages. *See Consolidated Rail Corp. v. BMWE*, slip op. No. 86-0318T (W.D.N.Y. April 6, 1986), *vacated*, 792 F.2d 303 (2d Cir. 1986). As a result of the Conrail disruption, President Reagan on the following day issued Executive Order No. 12,577, 51 Fed. Reg. 18,429 (May 20, 1986), 11 Weekly Comp. Pres. Doc. 643 (1986) appointing Presidential Emergency Board No. 209 to investigate and report on the BMWE's dispute with the MEC/PT, pursuant to Section 10 of the Railway Labor Act, 45 U.S.C. § 160. *See* Report No. 209.

The Conference believes that there are additional considerations relating to NRLC's interests and the BMWE's industry role which were not fully developed by the parties below, but are crucial to this Court's informed review of the Railway Labor Act issues raised by this case.

Most significantly, the BMWE represents not only maintenance of way employees on the MEC/PT, but the same craft or class of employees on the petitioner carriers, and indeed, most of the carriers in the industry. *See* 49 *National Mediation Board Annual Report* at 38 (1983); Report to the President By Emergency Board No. 211 (August 14, 1986) (hereinafter "Report No. 211"). Concurrently with the BMWE-MEC/PT dispute, the BMWE and the NRLC, as representative of its member carriers, were engaged in "national handling" collective bargaining negotiations. Report No. 211.[7]

Consistent with industry practice, the same pay and work rule issues raised by BMWE's "Section 6 notices" in the BMWE-MEC/PT dispute were the subject of the BMWE-NRLC bargaining for maintenance of way employees employed by the majority of the nation's rail carriers. *See* Report No. 209; Report No. 211; *Delaware & Hudson Ry. v. United Transp. Union*, 450 F.2d 603, 605 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971). Historically, the BMWE and MEC/PT have either participated in national handling or agreed to be bound by the terms of national settlements. Report No. 209. In 1984, the BMWE requested that MEC/PT participate in national handling, but MEC/PT declined to do so. *Id.*

Thus, the NRLC, as representative of petitioners and other carriers, was in mediation with the BMWE on

[7] Bargaining between the NRLC and BMWE commenced on June 21, 1984; in January 1985, mediation was initiated; the parties were released by the National Mediation Board on June 2, 1986; on July 15, 1986, the President established Emergency Board No. 211. Report No. 211.

national issues parallel to the BMWE-MEC/PT dispute at the time BMWE threatened and initiated a nationwide work stoppage against the NRLC-represented carriers.

SUMMARY OF ARGUMENT

Amicus Curiae maintains that the policies and procedures of the Railway Labor Act, when viewed in the context of railroad industry labor relations, must be construed as prohibiting a rail union which has exhausted the Act's procedures with one carrier from threatening or initiating economic action against other neutral carriers.

In concluding that secondary economic action is permissible under the Railway Labor Act, the court below interpreted the statute with excessive literalism and failed to enforce its fundamental obligations and procedures. Historically, the courts have actively developed the parties' general obligations and duties under the Act, and have inferred limitations on the use of economic self-help based upon the Act's central purpose of avoiding interruptions to commerce.

Self-help after exhaustion of the major dispute resolution procedures of the Railway Labor Act must be carrier-specific. Exhaustion of the Act's procedures gave the BMWE the legal power to engage in self-help against the MEC/PT. But the Act should not permit the BMWE to threaten or initiate work stoppages against other neutral carriers with whom the BMWE had not exhausted the Act's procedures. BMWE's utilization of economic weapons against NRLC-represented carriers, while BMWE and NRLC were in national handling mediation, violates BMWE's obligations under Section 2 First and is inherently destructive of the Act's negotiation and mediation procedures under Sections 5 and 6.

The BMWE's tactics and the decision below, by permitting nationwide work stoppages in the absence of

nationwide bargaining, fundamentally alter an industry bargaining structure which has limited national strike threats to circumstances of multicarrier bargaining in "national handling." A union subject to the Railway Labor Act should be permitted to threaten or initiate a nationwide work stoppage against various carriers *only* if it has engaged in national handling and exhausted the Act's procedures vis-a-vis the national multicarrier group.

ARGUMENT

I. THE RAILWAY LABOR ACT SHOULD BE INTERPRETED AND ENFORCED CONSISTENTLY WITH ITS POLICIES AND PROCEDURES TO LIMIT ECONOMIC SELF-HELP

As a preliminary matter to its argument in chief, the *Amicus Curiae* believes that the Court should approach this case with the traditionally active interpretative approach the Court has consistently utilized in enforcing the Railway Labor Act.

A. Courts Have Avoided A Literal Standard Of Interpreting The Railway Labor Act

In interpreting the Railway Labor Act as placing no limitation on a rail union's use of secondary economic pressure, the court below fundamentally misconstrued the role of the federal courts in enforcing the Act. The court opined that "[t]he Railway Labor Act is a statute establishing rules, not a statute establishing goals and calling on the judiciary to create the rules." 793 F.2d at 803. But, as this Court recognized in *Chicago & North Western R.R. v. United Transp. Union*, 402 U.S. 570 (1971), the Railway Labor Act is the paradigm of a statute articulating broad goals and duties, and calling upon the judiciary to amplify and enforce those duties to ensure that the Act's goals are realized.

The Court in *Chicago & N.W.R.R.* stated:

> We have often been confronted with similar questions in connection with other duties under the Railway Labor Act. Our cases reveal that where the statutory language and legislative history are unclear, the propriety of judicial enforcement turns on the importance of the duty in the scheme of the Act, the capacity of the courts to enforce it effectively, and the necessity for judicial enforcement if the right of the aggrieved party is not to prove illusory.

402 U.S. at 578. As the Court recognized, this broad role for judicial interpretation of the Act was intended by its drafters:

> "We believe, and this law has been written upon the theory, that in the development of the obligations in industrial relations and the law in regard thereto, there is more danger in attempting to write specific provisions and penalties into the law then there is in writing general duties and obligations into the law and letting the enforcement of those duties and obligations develop through the courts in the way in which the common law has developed in England and America."

402 U.S. at 576-7 (citing testimony of union counsel Donald R. Richberg, Hearings on Railroad Labor Disputes (H.R. 7180) before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess. 91 (1926)).[8]

The sixty year history of this Court's enforcement of the Railway Labor Act is characterized by judicial in-

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[8] The Railway Labor Act was a collectively-bargained piece of legislation "ratified by the Congress and the President." *Chicago & N.W.R.R.*, 402 U.S. at 576. In interpreting the Railway Labor Act, the federal courts have been called upon to act analogously to a labor arbitrator, whose "source of law is not confined to the express provisions of the contract, as the industrial common law —the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581-582 (1960).

itiative to effectuate the Act's policies and procedures. In *Texas & N.O.R.R. v. Railway Clerks*, 281 U.S. 548 (1930), the Court inferred authority from the Act's major and minor dispute procedures for judicial enforcement of the freedom to choose bargaining representatives. The Court in *Virginian Ry. v. System Federation 40*, 300 U.S. 515 (1937) found a judicially enforceable duty to negotiate based upon the Act's representation proceedings. Similarly, in *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944), the Court developed a judicially enforceable duty of fair representation based upon the Act's goals and structure. Thus, the petitioners' argument for an implied restriction on secondary activity under the Railway Labor Act is completely consistent with this Court's traditional exegesis of the Railway Labor Act based upon its policies and procedures.

The court below, and the other courts of appeals which have reviewed secondary boycott issues arising from the BMWE-MEC/PT dispute, also were misled in their analyses by the express treatment of secondary economic action under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.* (1982). In a simplistic approach, the courts have interpreted the absence of a provision in the Railway Labor Act analogous to the express prohibition on secondary boycotts contained in Section 8(b)(4) of the NLRA, 29 U.S.C. § 158(b)(4), as determinative of the issue whether the RLA restricts secondary economic action. 793 F.2d at 801-802.[9] But the federal courts previously have not hesitated to imply and enforce obligations under the Railway Labor Act in the absence of statutory language parallel to the express provisions of the NLRA.

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[9] *See Richmond, Fredericksburg & Potomac R.R. v. BMWE*, 795 F.2d 1161, 1166 (4th Cir. 1986); *Central Vermont Ry. v. BMWE*, 793 F.2d 1298, 1303 (D.C. Cir. 1986); *Consolidated Rail Corp. v. BMWE*, 792 F.2d 303, 304 (2d Cir. 1986). *See also Brotherhood of Maintenance of Way Employes v. Guilford Transportation Industries, Inc.*, No. 86-1366, slip op. at 17 (1st Cir. Oct. 28, 1986).

For example, there is no express restriction on recognitional picketing under the RLA equivalent to Section 8(b)(7) of the NLRA, 29 U.S.C. § 158(b)(7). Nonetheless, courts have enjoined recognitional picketing under the RLA in order to preserve the RLA's representational procedures. *Summit Airlines v. Teamsters Local 295*, 628 F.2d 787 (2d Cir. 1980). Similarly, there is no express authorization of federal court jurisdiction over contract breaches under any RLA equivalent to Section 301 of the NLRA, 29 U.S.C. § 185; and, indeed, Section 3 of the RLA, 45 U.S.C. § 153, gives the adjustment boards exclusive jurisdiction of such disputes. Nonetheless, courts have enjoined alleged carrier breaches of agreements in order to preserve the integrity of both the major and minor dispute procedures of the RLA. *See Brotherhood of Locomotive Engineers v. Missouri-K.-T. R.R.*, 363 U.S. 528 (1960); *Detroit & Toledo Shore Line R.R. v. United Tranp. Union*, 396 U.S. 142 (1969); *Local 553, TWU v. Eastern Air Lines*, 695 F.2d 668 (2d Cir. 1982).[10] The literalism of the decision below is, thus, uncharacteristic of historical Railway Labor Act exegesis.

B. Courts Have Interpreted The Railway Labor Act As Implicitly Restricting Self-help

Most importantly, the courts have not hesitated to emendate the Act to identify, define and limit judicially the parties' implicit rights to self-help. The words of the Railway Labor Act do not address the parties' repective rights to engage in economic self-help. This legisla-

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[10] There is also no express "unfair labor practice" provision under the RLA equivalent to Section 8(a) of the NLRA, 29 U.S.C. § 158(a), but many courts have examined various carrier actions and applied unfair labor practice theories borrowed from the NLRA. *See Air Line Pilots Ass'n v. United Air Lines, Inc.*, 802 F.2d 886 (7th Cir. 1986); *but see Independent Union of Flight Attendants v. Pan American World Airways*, 789 F.2d 139 (2d Cir. 1986).

tive silence was intentional, because Congress did not want to suggest that the Act permitted unrestrained action after exhaustion of its procedures:

> [I]f strikes were in express terms forbidden for a given period there might be an implication that after that period strikes to interfere with the passage of the United States mails and with continuous transportation service might be made legal. In the opinion of the committee, this possible implication should be avoided.

House Rep. No. 328, 69th Cong., 1st Sess. 5 (1926). Yet, the legislative history clearly anticipates the possibility of self-help after exhaustion of the Act's procedures. *Id.* at 4-5.[11] The Court has implied the right of the parties to use economic self-help after exhaustion of the Act's procedure, based upon the Act's failure to provide compulsory binding arbitration as a means of settling major disputes. *Brotherhood of Locomotive Engineers v. Baltimore & O.R.R.*, 372 U.S. 284, 290-291 (1963); *Railway Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 244 (1966).

But post-exhaustion self-help under the Railway Labor Act is not Armageddon. "Were a strike to be the occasion for a carrier to tear up and annul, so to speak, the entire collective bargaining agreement, labor-management relations would revert to the jungle." *Railway Clerks v. Florida East Coast Ry.*, 384 U.S. at 247 (1966). Instead, the Court has "honored" the "spirit of the Railway Labor Act" by forbidding an employer after exhaustion of the major dispute procedures to make sweeping changes in work rules during a strike. *Id.* The petitioner railroads seek a similar judicial limitation on the union's right to self-help.

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[11] The Railway Labor Act in its silence concerning strikes contrasts sharply with the National Labor Relations Act, which specifies under Section 13 that employees have a right to strike, except as expressly limited by the Act. 29 U.S.C. § 163; *See NLRB v. Erie Resistor Co.*, 373 U.S. 221 (1963).

In judicially defining the parties' use of self-help, the Court has been guided by the express purposes of the Railway Labor Act:

> (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; . . . (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions . . . .

Section 2, 45 U.S.C. § 151a. Navigating on these polestars the Court has consistently limited the parties' use of self-help in order to preserve the Act's policies and procedures. Despite the lack of express authority in the RLA, the Court has permitted injunctions precluding self-help until the parties have exhausted major dispute collective bargaining procedures, or, even after exhaustion, when a party has failed to bargain in good faith. *Chicago & N.W.R. R. v. United Transp. Union*, 402 U.S. 570 (1971). The Act also makes no provision for injunctions requiring adherence to the procedures for the mandatory adjustment of grievances. Yet, the Court has authorized injunctions against self-help when the underlying minor dispute could be solved by the grievance procedures specified in the collective bargaining agreement and the statute. *Brotherhood of Railroad Trainmen v. Chicago River & I.R.R.*, 353 U.S. 30 (1957).

Amicus Curiae believes that the restriction on secondary economic pressure sought by petitioners is justified by the policies and procedures of the Act in the same fashion as the limitations upon self-help found in *Florida East Coast*, *Chicago & N.W.R.R.* and *Chicago River*. A literal reading of the Railway Labor Act, uninformed by the Act's policies, procedures, and bargaining structure, should not determine this case.

II. THE RAILWAY LABOR ACT PROHIBITS A RAIL UNION FROM UNDERTAKING ECONOMIC ACTION AGAINST A CARRIER WHEN THE UNION HAS NOT EXHAUSTED THE ACT'S MAJOR DISPUTE RESOLUTION PROCEDURE WITH RESPECT TO THAT CARRIER

The decisions of the courts of appeals which have reviewed the BMWE's use of work stoppages against secondary employers in the MEC/PT dispute have taken a myopic view of the Railway Labor Act and have failed to consider the bargaining structure of the railroad industry. In refusing to limit the scope of BMWE's self-help against neutral, secondary employers, the courts have focused exclusively upon the BMWE-MEC/PT relationship under the Railway Labor Act. *Amicus Curiae* maintains that examining BMWE's economic action from the perspective of industry-wide bargaining demonstrates its unlawfulness under the Railway Labor Act.

A. The Labor Relations Structure Of The Railroad Industry

The issue of the lawfulness of secondary economic action under the Railway Labor Act must be reviewed with due consideration of the unique labor relations structure of the railroad industry.[12]

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[12] As Justice Frankfurter so aptly noted:

> From the point of view of industrial relations our railroads are largely a thing apart. The nature and history of the industry, the experience with unionization of the roads, the concentration of authority on both sides of the industry in negotiating collective agreements, the intimacy of relationship between the leaders of the two parties shaped by a long course of national, or at least regional, negotiations, the intricate technical aspects of these agreements and the specialized knowledge for which their interpretation and application call, the practical interdependence of seemingly separate collective agreements—these and similar considerations admonish against mutilating the comprehensive and complicated system governing railroad industrial relations by episodic utilization of inapposite judicial remedies.

Elgin, J. & E.R.R. v. Burley, 325 U.S. 711, 751 (1945) (Frankfurter, J., dissenting).

The railroad industry is heavily and uniformly unionized. The union's railroads were one of the first industries to be unionized, and remain, almost a century later, one of the most thoroughly unionized industries in the nation. *See The Railway Labor Act At Fifty* 17-18, 24-26 (C. Rehmus, ed. 1977). The industry's bargaining structure of traditionally distinct crafts or classes and systemwide bargaining units has been preserved by the National Mediation Board. *See Switchmen's Union v. National Mediation Board*, 135 F.2d 785, 794 (D.C. Cir.), *rev'd on other g'nds*, 320 U.S. 297 (1943); *see also New Jersey Transit Rail Op.*, 11 NMB 57 (1983). Maintenance of way employees, for example, form a distinct craft or class. *See* 49 *National Mediation Board Annual Report* at 38 (1983); *New York C.R.R.*, 1 NMB 17 (1937).

This bargaining unit structure has resulted in single rail unions representing the same groups of employees on practically all carriers in the industry. The Brotherhood of Maintenance of Way Employes, for example, represents maintenance of way employees on 32 of 33 major carriers. *See* 49 *National Mediation Board Annual Report* at 38 (1983). In the 1986 multicarrier, multiunion bargaining, BMWE represented the employees of some 85 industry carriers. *See* Report No. 211. The BMWE's industry-wide representation is not unique, but rather, is characteristic of the hegemony of other major rail unions such as the Brotherhood of Locomotive Engineers, the United Transportation Union, and the Brotherhood of Railway, Airline & Steamship Clerks. *See* 49 *National Mediation Board Annual Report* at 38 (1983).[13]

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[13] The airline industry, which is also subject to the Railway Labor Act, 45 U.S.C. § 181 *et seq.*, exhibits similar industry-wide union dominance in certain crafts or classes. The Air Line Pilots

This industry structure gives rail unions a unique ability to conduct industry-wide work stoppages. A union such as the BMWE has industry-wide presence which enables it, if it chooses, to utilize a variety of tactics to accomplish the withdrawal of services by the employees it represents on the major rail carriers. Further, because there is a strong tradition in the railroad industry of honoring the picket lines of unions representing other crafts,[14] a rail union can extend a work stoppage beyond the employees it represents, and impair a carrier's operations. Thus, in terms of economic and operational impact upon a carrier, there is no real distinction in the rail industry between being the target of secondary pickets or the object of a primary economic strike.

The courts which have reviewed the BMWE's actions against neutral carriers appear to have incorrectly viewed picketing and strikes as practically and legally distinguishable forms of economic action under the Railway Labor Act. *See Brotherhood of Maintenance of Way Employees v. Association of American Railroads*, 639 F. Supp. at 223-224, 227 n. 20 (D.D.C.), *affirmed*, 793 F.2d 1298 (D.C. Cir. 1986). The National Labor Relations Act under Sections 7, 8(b)(4), 8(b)(7), and 13

Association is the primary representative of flight crew members, and the International Association of Machinists is the dominant representative of mechanics; other crafts, such as flight attendants, have more competing or company-specific unions. *See* 49 *National Mediation Board Annual Report* at 40. In the recent *Texas Air-Eastern Acquisition Case*, U.S. Department of Transportation, Docket No. 43825, the International Association of Machinists stated that in light of the recent BMWE decisions the possibility of a nationwide disruption of the air transportation system has been "greatly increased."

[14] *See Delaware & Hudson Ry. v. United Transp. Union*, 450 F.2d 603, 613 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971); *Western Maryland R.R. v. Systems Board*, 465 F. Supp. 963, 975 (D. Md. 1979).

does distinguish strikes, picketing and general "concerted activities". 29 U.S.C. §§ 157, 158(b)(4), 158(b)(7), 163. In contrast, the Railway Labor Act takes a more pragmatic approach and focuses only on the effects of economic actions in terms of "*any* interruption to commerce." 45 U.S.C. §§ 151a(1), 152 First (emphasis added).

In this case, the BMWE's threat and actions were not limited to secondary "picketing": the April 8, 1986 telegram threatened to "shut down the nation's railroad system," by "ask[ing] our members and other railroad employees to withdraw their services." And with respect to Conrail, there is evidence that the BMWE both placed pickets and issued strike instructions to its members on the neutral carriers. *See supra* note 6.

In terms of the BMWE's bargaining relationships with industry carriers, and the BMWE's collective bargaining goals, there is also no real distinction between picketing and a strike against neutral carriers. The BMWE, a national rail union, represents both the neutral carriers' maintenance of way employees and the MEC/PT employees. Indeed, the national union capitalized on those relationships by extending the MEC/PT work stoppage to its members on the neutral NRLC carriers. While the BMWE may argue that its primary strike on the MEC/PT and its secondary economic actions against petitioners are motivated solely by BMWE concerns on the MEC/PT, the work stoppages on the neutral carriers can only embitter the bargaining relationships between BMWE and the neutral carriers in the same manner as if they were the targets of a primary strike. The union's motives for economic action is also a matter within the sole evidentiary control of the union. Further, it is impossible, in practice, to distinguish union goals between primary and secondary carriers in an industry where

wages, benefits, and to a lesser degree workrules, have had a national consistency.[15]

In this case the BMWE's apparent goals also have not been "secondary" in its traditional sense. Secondary activity has been defined as economic pressure against a third party with the goal of having the third party cease doing business or otherwise bring pressure upon the primary employer. *See Local 761, Electrical Workers (IUE) v. NLRB*, 366 U.S. 667, 672, 673-674 (1961); *Longshoremen v. Allied Int'l, Inc.*, 456 U.S. 212, 224 (1982); *Kroger Co. v. NLRB*, 647 F.2d 634, 637 (6th Cir. 1980). The BMWE maintains that it can undertake work stoppages against carriers who have effectively no operational interaction with MEC/PT and are "strangers" to the dispute. 793 F.2d at 798, 799. The BMWE's transparent goals in extending the MEC/PT work stoppage were to precipitate a national rail emergency in order to obtain the appointment of a Presidential Emergency Board in the MEC/PT dispute and, ultimately, to affect the outcome of ongoing collective bargaining on the secondary carriers. *See supra* note 6.

B. The BMWE Owed A Duty Under Section 2 First To Petitioners And Other NRLC Carriers

Section 2 First has been termed by this Court as "the heart of the Railway Labor Act." *Brotherhood of Railroad Trainmen v. Jacksonville Terminal*, 394 U.S. 369, 377-378 (1969); *Chicago & N.W.R.R. v. United Transp. Union*, 402 U.S. 570, 574 (1971). The Section, which

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[15] This is well illustrated by the parallel issues between the concurrent BMWE-MEC/PT dispute and the BMWE-NRLC dispute. *Compare* Report No. 209 and Report No. 211. One of the principal recommendations of Emergency Board No. 209 was that the parties in the BMWE-MEC/PT dispute "should agree to be bound by the results of the national negotiations involving rates of pay and health and welfare programs." Report No. 209.

the Court found judicially enforceable in *Chicago & N.W. R.R.*, provides:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. § 152.

The courts have consistently viewed Section 2 First as placing an obligation on the parties to Railway Labor Act collective bargaining relationships to utilize all available mechanisms to resolve their disputes short of economic action.[16] The BMWE, as representative of petitioners' and other NRLC carriers' maintenance of way employees, is subject to the constraints of Section 2 First in its bargaining relationship with those carriers.[17]

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[16] *See Chicago & N.W.R.R. v. United Transp. Union*, 402 U.S. 570 (1971) (major dispute procedures); *Brotherhood of Railroad Trainmen v. Chicago River & I.R.R.*, 353 U.S. 30 (1957) (minor dispute procedures); *Summit Airlines v. Teamsters Local 295*, 628 F.2d 787 (2d Cir. 1980) (representational procedures).

[17] Two of the courts of appeals apparently have concluded that the Section 2 First obligation runs to and from only a carrier's employees, and not their union representative. *See Central Vermont Ry. v. BMWE*, 793 F.2d 1298, 1302 n.9 (D.C. Cir. 1986); *Consolidated Rail Corp. v. BMWE*, 792 F.2d 303, 304 (2d Cir. 1986). That is plainly erroneous. This Court has never expressed any doubt that the Section 2 First obligation applies to *a union*. *Chicago & N.W.R.R.*, 402 U.S. at 571 ("The substance of the complaint was that in the negotiations between the parties over work rules, *the Union* had failed to perform its obligations under § 2 First of the Railway Labor Act . . . ."). The Second Circuit itself has found the Section 2 First obligation applicable to a union

The Consolidated Rail Corporation in *Consolidated Rail Corp. v. BMWE*, No. 86-0318T (W.D.N.Y. April 6, 1986), *vacated*, 792 F.2d 303 (2d Cir. 1986), has argued that Section 2 First obligated the BMWE to utilize the Act's Section 5 and 6 procedures of negotiation and mediation prior to undertaking economic actions against Conrail and other neutral, secondary carriers. The Second Circuit rejected this argument, finding that the delay in the Act's procedures would effectively preclude timely secondary activity. 792 F.2d at 304-305.[18] *Amicus Curiae* submits that, even assuming *arguendo* that the Second Circuit is correct in concluding that the Act's major dispute procedures are not well-suited to secondary boycott issues, that does not remove the BMWE's Section 2 First obligation to neutral, secondary carriers.

Rather, *Amicus Curiae* maintains that Section 2 First places a more absolute restriction on the BMWE's economic actions. Section 2 First creates an enforceable obligation that a union not interrupt a carrier's operations unless and until the Act's major dispute procedures have been exhausted. That obligation runs between the rail union, as representative of the carrier's employees, and the specific carrier. If a rail union has not exhausted the Act relative to a specific carrier, or cannot exhaust the Act because no procedure is well-suited to the union's concern or problem, then Section 2 First must

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even in the absence of a bargaining relationship. *Summit Air Lines v. Teamsters Local 295*, 628 F.2d 787, 790 (2d Cir. 1980). And the Section 2 First obligation has been found to apply to individual union leaders, such as the individual respondents herein. *See, e.g., National Airlines v. Air Line Pilots Ass'n*, 78 Lab. Cas. (CCH) ¶ 11,361 (S.D. Fla. 1975). If unions are not subject to Section 2 First based upon their bargaining relationship with a carrier, then rail and airline management has been suing the wrong parties in effectively every action brought by management under Section 2 First.

[18] *See also Central Vermont Ry. v. BMWE*, 793 F.2d 1298, 1302-1303 (D.C. Cir. 1986).

be interpreted as precluding the union's use of economic self-help against that carrier. Any other interpretation will create a perverse incentive for a union to circumvent the Act's procedures to capitalize on an opportunity to utilize the leverage of unrestrained economic action.[19]

This interpretation is firmly rooted in the industry's bargaining structure and the role that industry-wide unions such as the BMWE play. The BMWE will maintain that in pursuing secondary action against petitioners and other NRLC carriers, it has acted only as representative of MEC/PT employees. Yet, at the same time, the BMWE will justify its secondary activity against neutral carriers because of the "economic self-interest" of the neutral carriers' employees it represents and their "solidarity" with MEC/PT employees. The reality is that BMWE is capable of waging successful work stoppages against neutral, secondary carriers only because of its bargaining relationships with those carriers. Further, the BMWE's pursuit of a nationwide strike is based on the rail union's perception of common issues between all carriers and all maintenance of way employees in the industry. *See supra* note 15.

The BMWE has become voluntarily the representative of neutral carrier employees, and should be subjected in those relationships to plenary obligations under Section 2 First. If BMWE's secondary work stoppages are based in the interests of the neutral carrier employees it represents, then it must exhaust the Railway Labor Act procedures with respect to those carriers prior to initiating a work stoppage against them. If BMWE's secondary work stoppages are based solely on interests of the MEC/

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[19] That phenomenon is illustrated by rail unions' repeated attempts to characterize contract interpretation disputes as "major" in order to avoid the minor dispute procedures of the adjustment boards and to be free to engage in unenjoinable self-help. *See Rutland Ry. v. Brotherhood of Locomotive Engineers*, 307 F.2d 21, 33 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963).

PT employees, and not those of neutral carrier employees, then Section 2 First should be interpreted as prohibiting secondary work stoppages in order to preclude the union from exploiting its bargaining relationships with neutral carriers.

As this Court has recognized, work stoppages can be inherently destructive of bargaining relationships which the Railway Labor Act intends to preserve. *See Railway Clerks v. Florida East Coast Ry.*, 384 U.S. 238 (1966); *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 147-149 (1969). The *Amicus Curiae* submits that the most destructive work stoppages from both labor relations and interstate commerce perspectives are ones which a carrier has no ability to resolve. In the MEC/PT dispute, the BMWE instigated work stoppages against neutral carriers for the pure goal of causing a national crisis. The neutral carriers were powerless to make concessions that would terminate the BMWE's economic pressure. Making a neutral rail carrier the target of economic action, and inflicting harm upon a carrier for reasons extrinsic to any collective bargaining goal with that carrier, is plainly inconsistent with Section 2 First. If Section 2 First means anything, it must mean that a union cannot use a carrier with whom it has a collective bargaining relationship as a hostage to bargaining goals elsewhere.

For these reasons, the Conference submits that there was a firm basis in Section 2 First and *Chicago & N.W. R.R.* for enjoining secondary work stoppages by the BMWE against neutral rail carriers with whom the BMWE has bargaining relationships.

C. The BMWE's Secondary Pressure Against Neutral Carriers Undermines The Railway Labor Act's Major Dispute Procedures

The Railway Labor Act under Sections 5 and 6 imposes extensive procedures for resolving major disputes. The Act requires notices of intended changes, negotiation conferences, mediation under the auspices of the National Mediation Board, and possibly Emergency Board proceedings, prior to the parties' utilization of self-help. *See Brotherhood of Locomotive Engineers v. Baltimore & O.R.R.*, 372 U.S. 284 (1963). As this Court has recognized, the "almost interminable process" for resolving major disputes was designed to prevent interruptions to interstate commerce from rail labor disputes. *Detroit & Toledo Shore Line R. R. v. United Transp. Union*, 396 U.S. 142, 148-149 (1969). Most importantly, during these major dispute procedures, self-help is clearly precluded under the Act's "status quo" provisions. In *Detroit & Toledo Shore Line* the Court stated:

> The Act's status quo requirement is central to its design. Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike. In the long run, delaying the time when the parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or lockout.

396 U.S. at 150. As this case aptly illustrates, if the Railway Labor Act does not prohibit economic action against neutral, secondary employers, then the status quo obligation has been rendered largely nugatory.

The NRLC was engaged in multicarrier, multiunion bargaining with the BMWE on behalf of some 85 carriers, including the petitioners and almost all major rail carriers in the nation, at the time the BMWE initiated its secondary work stoppages. In April 1986 and until June 2, 1986, the NRLC and the BMWE were in mediation under the auspices of the National Mediation Board on collective bargaining issues parallel to those in BMWE's dispute with the MEC/PT. *See* Report No. 211.

Under *Detroit & Toledo Shore Line* it is beyond dispute that at the time of the BMWE's secondary threats

and work stoppages directed towards NRLC carriers, the status quo requirement of Section 6 precluded the BMWE from initiating *any* economic action against the 85 NRLC-represented carriers. Nonetheless, the decision below held, in effect, that it was lawful for BMWE at that very time to exert massive economic pressure in the form of secondary activity against those same neutral carriers.

Amicus Curiae submits that permitting economic action, for whatever reason and in whatever manner, against a carrier during the status quo period of Section 6, is inconsistent with and inherently destructive of the Railway Labor Act's procedures. BMWE may maintain that the status quo obligation only applied to issues relating to "national handling" and not the MEC/PT dispute. But such a distinction is illusory. *A work stoppage will disrupt the bargaining process no matter what the union's motivation or goals.* To paraphrase *Detroit & Toledo Shore Line*: tempers cannot cool when a carrier's operations are shut down, an atmosphere of rational bargaining no longer exists when a strike is in effect, and the forces of public opinion cannot be mobilized against a strike that has already occurred. 396 U.S. at 150.

Further, it will ultimately prove impossible to distinguish secondary and primary goals in a work stoppage during the status quo period. The possibility of pretext cannot be discounted. By exhausting with respect to one carrier and engaging in secondary economic activity a union can prematurely press bargaining goals with the neutral employer. Or the mere existence of a work stoppage can be a "flexing of muscle" in anticipation of future bargaining and an ultimate strike.[20]

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[20] *See, e.g., American Airlines, Inc. v. Transport Workers Union*, 487 F. Supp. 249, 253 (E.D.N.Y. 1980) (ostensible sympathy strike as "the first step in an effort to obtain 'the best contract ever negotiated in the airline industry' ").

In short, if economic action is permitted against neutral, secondary carriers under the Railway Labor Act, then the carefully crafted procedures for resolving major disputes can be easily circumvented by rail unions through premature and pretextual work stoppages.

D. The Railway Labor Act's Dispute Resolution Procedures Are Comprehensive And Carrier-Specific

Amicus Curiae does not interpret the Railway Labor Act as prohibiting secondary economic action only in the circumstances where a rail union has a bargaining relationship with a neutral carrier. The Section 2 First obligation and Section 6 procedures discussed above simply illustrate how economic action against neutral, secondary carriers can be, and in this case is, a plain violation of the Act. In addition, the Conference believes that the Railway Labor Act, when viewed in its entirety, implicitly prohibits economic action against neutral, secondary carriers.

The primary error of the court below, and other courts which have reviewed the BMWE's secondary action, is that they have viewed the BMWE's action as "unregulated" under the Railway Labor Act. 793 F.2d at 804. *Amicus Curiae* submits that, to the contrary, the Railway Labor Act was intended, and has operated for sixty years, as a comprehensive scheme for regulating *all* economic action in the railroad industry.

This Court has recognized that "the major purpose of Congress in passing the Railway Labor Act was to provide a machinery to prevent strikes." *Texas & N.O.R. R. v. Railway Clerks*, 281 U.S. 548, 565 (1930); *Detroit & Toledo Shore Line v. United Transp. Union*, 396 U.S. 142, 148 (1969). The Act speaks in its general purposes under Section 2 of avoiding "*any* interruption to commerce," and in Section 2 First of reaching "*all* disputes", in order to avoid "*any* interruption to commerce," 45 U.S.C. §§ 151a(1), 152 First (emphasis added). The

intent of the Act was to comprehensively treat railroad industry labor disputes, with special procedures for major disputes, Sections 5, 6, 8, 10; minor or other disputes, Section 3; and representational disputes, Section 2 Ninth. *See generally Elgin, J. & E.R.R. v. Burley*, 325 U.S. 711, 751 (1945). Indeed, Congress passed the 1934 amendments to the original 1926 Act in order, in part, to maintain this comprehensiveness and to prevent work stoppages relating to minor disputes. *See Brotherhood of Railroad Trainmen v. Chicago River & I.R.R.*, 353 U.S. 30, 35-39 (1957). This history of comprehensive regulation of self-help has been cited by the Court as justification for more active judicial intervention under the RLA than the NLRA. *See Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 210-212 (1962).[21]

Amicus Curiae submits that, in its comprehensiveness, the Railway Labor Act deals with the lawfulness of economic action against neutral, secondary carriers. Simply stated, the only circumstances in which the Act permits self-help by a rail union against a carrier is after exhaustion of the Act's procedure with respect to that carrier. The major dispute procedures are by their terms carrier-specific, and exhaustion with respect to one carrier does not under the Act give a rail union a license to undertake work stoppages against other industry carriers.

The court below viewed Congress as somehow neglecting to include a secondary boycott provision in the Rail-

[21] The comprehensiveness of the Railway Labor Act was also recognized in the legislative history of the Norris-LaGuardia Act by that Act's principal sponsor:

> *Mr. LaGuardia:* We then passed the railroad labor act, and that takes care of the whole labor situation pertaining to the railroads. They could not possibly come under this for the reason that we provided machinery there for settling labor disputes.

75 Cong. Rec. 5499 (1932).

way Labor Act. 793 F.2d at 801-802. But rather, no secondary boycott provision has ever been necessary in the Railway Labor Act, because the Act implicitly restricts self-help against a carrier to circumstances where the major dispute procedures have been exhausted with that carrier.

There are situations, however, in which a strike against a primary carrier will have lawful secondary effects on other carriers. Where both carriers have common facilities the Act has been intepreted as permitting a union to strike the primary carrier notwithstanding its impact on the secondary carrier at such facilities. *See Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969).[22] When a secondary carrier has integrated its operations with a struck carrier or provided special assistance to the primary carrier during a strike, then economic action can be permitted against the secondary, non-neutral carrier under the "substantial alignment" or "ally doctrine" standards. *See Ashley, Drew & Northern Ry. v. United Transp. Union*, 625 F.2d 1357 (8th Cir. 1980) (substantial alignment standard).[23] *See, also, NLRB v. Teamsters Local 810 (Advance Trucking Co.)*, 299 F.2d 636 (2d Cir. 1962) (ally doctrine). These are situations, however, not of "unregulated" conduct against secondary carriers but of protection of a union's right to engage in primary economic action notwithstanding its limited effects on secondary carriers.

[22] The Conference concurs in petitioners' argument that *Jacksonville Terminal* addressed only the enjoinability of secondary activity under state law. To the extent *Jacksonville Terminal* is interpreted as opining on the enjoinability of secondary economic action under the RLA, it should be viewed as a common-situs case limited to its facts.

[23] The Conference submits that the "substantial alignment" standard which has been developed in the railroad industry under the Norris-LaGuardia Act would be more appropriately viewed as based in the procedures and policies of the Railway Labor Act.

Amicus Curiae recognizes that the analysis it suggests will require the federal courts to determine questions of "neutrality" in order to resolve whether economic action affecting another carrier is lawful. But the right to self-help was itself implied by this Court, not express in the Act, and its delineation is left to the judicial procees. The crafters of the Act anticipated just such a judicial role in the development of the Railway Labor Act. Judicially developed limitations on the right to extend lawful self-help to neutral parties also have been common under the NLRA. *See generally Woodwork Manufacturers v. NLRB*, 386 U.S. 612, 644-645 (1966).

The railroad industry needs guidance from the Court concerning the permissible scope of self-help in economic strikes under the Railway Labor Act. *Amicus Curiae* believes it is clear, however, that the type of unrestrained secondary activity undertaken by the BMWE is contrary to the policies and procedures of the Act, and cannot be permitted to recur.

III. THE RAILWAY LABOR ACT PROHIBITS A RAIL UNION FROM UNDERTAKING NATIONWIDE ECONOMIC ACTION AGAINST RAILROAD INDUSTRY CARRIERS WHEN THE UNION HAS NOT EXHAUSTED THE ACT'S MAJOR DISPUTE PROCEDURES IN NATIONAL HANDLING

If, as argued above, the Railway Labor Act prohibits extending a work stoppage against a single carrier to another neutral carrier, then *a fortiori* it prohibits rail unions from initiating nationwide work stoppages based upon exhaustion of the Act's procedures with a single carrier. The BMWE maintains that it has the power to initiate a nationwide work stoppage, through secondary economic action, in effectively *any* major dispute. *Amicus Curiae* submits that if the BMWE's position is upheld, then it will, through the proliferation of work stoppages, destroy the bargaining structure that has existed in the railroad industry for sixty years.

The BMWE's use of secondary work stoppages to escalate a local dispute into a nationwide rail emergency is unprecedented. In the history of the Railway Labor Act there have been only three widely-known labor disputes in which rail unions have undertaken any secondary economic activity: the multiunion Florida East Coast Railway dispute of the early 1960s, *see Brotherhood of Railroad Trainmen v. Jacksonville Terminal*, 394 U.S. 369 (1969); the 1978 dispute between the Norfolk and Western Railway and the Brotherhood of Railway and Airline Clerks, *see Consolidated Rail Corp. v. Railway Clerks*, 99 LRRM (BNA) 2607 (W.D.N.Y. 1978) *app. dism'd as moot*, 595 F.2d 1708 (2d Cir. 1979); and the 1986 dispute involving the MEC/PT and the BMWE.

Prior to the MEC/PT dispute, the only threat of a nationwide work stoppage in the railroad industry had arisen in "national handling." The dominant bargaining structure in the railroad industry is one of multicarrier, national bargaining on wage, benefit, and certain work-rule issues, and local bargaining on remaining issues. *See Brotherhood of Railroad Trainmen v. Atlantic Coast Line*, 383 F.2d 225, 228 (D.C. Cir. 1967), *cert, denied*, 390 U.S. 1047 (1968); Report No. 211. The nation's railroad carriers have been faced with national strikes or the threat of national strikes caused by a breakdown in national handling in 1941, 1943, 1946, 1948, 1950, 1962, 1967, 1970, 1971, and 1982. *See* 128 Cong. Rec. H7382-83 (daily ed. September 22, 1982) (statement of Rep. Broyhill); H. Lustgarden, *Principles of Railroad and Airline Labor Law* 91-96 (1984); and *The Railway Labor Act At Fifty* 156-76 (C. Rehmus, ed. 1977). Therefore, the current dispute between the BMWE and MEC/PT is unique: it is the first local dispute that, through secondary economic action against neutral carriers, has threatened to precipitate a nationwide work stoppage.

Thus, historically, self-help has been coterminous with the scope of bargaining. In *Delaware & Hudson Ry. v. United Transp. Union*, 450 F.2d 603 (D.C. Cir.), *cert.*

denied, 403 U.S. 911 (1971), the Court considered rail unions' use of selective strikes after exhaustion in national handling disputes. The Court concluded that rail unions which engage in national handling are not obligated to conduct nationwide strikes, but could elect to conduct work stoppages against only select carriers. That result is based on the fact that the union had, through national handling, exhausted the Act with each carrier.

But the converse cannot be permitted: a rail union cannot undertake a nationwide work stoppage without national handling and after exhausting the Act with only one carrier. To hold otherwise would ignore the mandate of the Section 6 procedures.[24] Further, under the reasoning of *Brotherhood of Railroad Trainmen v. Atlantic Coast Line*, 383 F.2d 225, 228 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1047 (1968), BMWE's unprecedented use of nationwide work stoppages constitutes an attempt to unlawfully modify the railroad industry's bargaining structure in violation of the union's obligation under Section 2 First.[25]

Permitting the BMWE's nationwide use of secondary economic action will have dramatic effect on rail industry bargaining. There are an estimated 1000 railroad industry collective bargaining agreements involved in major disputes annually. *See The Railway Labor Act At Fifty* 246 (C. Rehmus ed. 1977) 246. Each of these major disputes can now become an occasion for a geographically broad, and potentially nationwide, work stoppage threat.

[24] If the BMWE could initiate a nationwide work stoppage after exhausting with respect to MEC/PT, then under the rationale of *Delaware & Hudson* the NRLC carriers should be able to initiate a nationwide lockout against the BMWE, notwithstanding the lack of exhaustion of the Act's procedures in national handling. 450 F.2d at 614-615. Any other result would destroy the mutuality of self-help weapons which has been characteristic of collective bargaining under the Railway Labor Act.

[25] In *Atlantic Coast Line*, the court concluded that multicarrier bargaining is lawful, and sometimes obligatory under the Railway Labor Act. 383 F.2d at 229. The approach of *Atlantic Coast Line* was to imply a duty under Section 2 First for parties in rail disputes to maintain the national bargaining structure. Whatever the contours of such a duty, the BMWE clearly has breached it and attempted to undermine the national bargaining structure by threatening and initiating nationwide economic action outside national handling.

The decision below, if upheld, can only lead to an escalation and proliferation of work stoppages and interruptions to commerce in the rail industry. There have been only 211 Emergency Boards appointed by Presidents pursuant to Section 10 in the sixty years of Railway Labor Act history.[26] The potential proliferation of rail industry strike threats could require the appointment of as many Emergency Boards in the next six years, as has been required in the last sixty.

For sixty years rail labor and management have understood the Railway Labor Act's restraints and the rules for collective bargaining and economic self-help. The decisions of the courts of appeals permitting secondary work stoppages in the BMWE-MEC/PT dispute have dramatically changed the rules.

Amicus Curiae requests the Court to restore and preserve the traditional bargaining structure in the railroad industry. The Railway Labor Act has been an effective statute that has met its stated purposes and avoided interruptions to interstate commerce and facilitated the resolution of labor disputes for sixty years. This Court should not permit the unrestrained tactics of one rail union, and the uninformed and literal interpretations of the Act by several courts, to result in dramatic and destabilizing changes in the Railway Labor Act's application and enforcement.

[26] The Railway Labor Act's drafters anticipated the "it should be seldom, if ever, necessary for the President to exercise the power conferred upon him to appoint an emergency board." House Report No. 328, 69th Cong. 1st Sess. 4 (1926).

CONCLUSION

For the foregoing reasons, *Amicus Curiae* National Railway Labor Conference urges that the Court reverse the decision below.

Respectfully submitted,

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No. 86-39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY, *et al.*,
Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-39

BURLINGTON NORTHERN RAILROAD COMPANY, *et al.*,
Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE AS AMICUS CURIAE

The National Industrial Transportation League submits this brief as *amicus curiae* in support of the petitioners, Burlington Northern Railroad Company, *et al.* The League wishes to present its views on why this Court should reverse the decision of the United States Court of Appeals for the Seventh Circuit in *Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employees*, 793 F.2d 795 (7th Cir. 1986). Consent to the filing of this brief has

been received from counsel for the petitioners and for the respondents. Letters from both counsel granting consent have been filed with the Clerk of the Court.

INTEREST OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League is an incorporated trade association whose membership includes approximately 1400 members. They are shippers and receivers of freight and users of railroad transportation services located throughout the United States. Such shippers and receivers of freight transported by railroad carriers are heavily dependent on the uninterrupted availability of railroad transportation service in interstate and foreign commerce.

The issues in this case involve the application of the sometimes conflicting policies underlying the Railway Labor Act, on the one hand, and the Norris-LaGuardia Act, on the other, to situations where employees involved in a major labor dispute with their employing railroad engage in secondary picketing of other railroads which may provide connecting services to the shippers served by the railroad engaged in the primary labor dispute. Such secondary picketing can take place on very short notice and can have very disruptive effects on all of the transportation services being provided by the railroad carriers not engaged or involved in the primary labor dispute.

The court below held that the Norris-LaGuardia Act did not permit a federal court to enter an injunction against such secondary picketing, even where procedures established by the Railway Labor Act for the resolution of labor disputes in the railroad industry had not been followed between the employees engaged in the secondary picketing, and the railroads subject to such picketing. The League and its members believe it is essential for this Court to reverse the decision of the Court of Appeals on this important question of federal labor law and hold that the Railway Labor Act does not permit such secondary picketing.

ARGUMENT

I. Secondary Picketing Is Inconsistent with the Fundamental Purpose of the Railway Labor Act

The fundamental purpose of the Railway Labor Act is "to avoid any interruption to commerce or to the operation of any carrier engaged therein."Railway Labor Act, Section 2, 45 U.S.C. §151a. This purpose is achieved by the operation of the other provisions of the Act "requiring and facilitating free collective bargaining between railroads and the labor organizations representing their employees."*United Transportation Union v. Long Island R. Co.*, 455 U.S. 678, 688 (1982).These procedures serve to "prevent, if possible, wasteful strikes and interruptions of interstate commerce."*Detroit and Toledo Shore Line R. Co. v. United Transportation Union*, 396 U.S. 142, 148 (1969).

The decision of the Court of Appeals below is inconsistent with this fundamental purpose of the Act, because it would prevent Federal courts from enjoining employees of a railroad engaged in a major labor dispute with one railroad from engaging in picketing of other railroads not involved in the dispute which may provide connecting services to the shippers served by the railroad which is involved in the labor dispute.

The explicit terms of the Railway Labor Act, 45 U.S.C. §§151-163, do not either bar or prohibit such "secondary" picketing, but, in order to carry out its fundamental purpose of preventing railroad strikes which interrupt commerce, it does establish elaborate procedures which must be followed before employees may resort to self-help measures such as picketing to resolve a major dispute with a railroad employer. 45 U.S.C. §152, §§155-160, and *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-380 (1969). The Act provides an "elaborate machinery for negotiation, mediation, voluntary arbitration, and conciliation" and imposes "upon the parties an obligation to make every reasonable effort to negotiate a settlement and to refrain from altering the status quo by resorting to self-help while the Act's remedies were being exhausted."*Detroit and Toledo Shore Line v. U.T.U., supra*, 396 U.S. at 148-149.

In this case, the members of the respondent labor unions, having exhausted all of the Act's remedies with respect to their primary employer, and being unsuccessful in their strike against the primary employer, chose to exert economic pressure on their employer by attempting to disrupt, by secondary picketing, the operations of other rail carriers which interchanged rail traffic with the primary employer. Pet. App. p. 2a. The secondary picketing would be expected to disrupt such operations by causing employees of the other railroads to refuse to cross picket lines established by the respondents' members. No effort was made to invoke, much less exhaust, with the other railroads the dispute resolution procedures of the Act before engaging in the picketing.

The Court should now decide that the Railway Labor Act must be interpreted so that, at the very least, railroad employees are required to exhaust the dispute resolution procedures of the Act with respect to other employers in the railroad industry (who may have some direct or indirect connection with the primary employer), before they may engage in self-help measures against such employers. If the Court of Appeals decision is not reversed, secondary picketing will become a more commonly used self-help measure in labor disputes under the Railway Labor Act with potentially major disruptions to transportation industries subject to its provisions.

Congress has not specified in the Railway Labor Act what measures, if any, each side may or may not resort to when all of the elements in the detailed statutory framework for labor dispute resolution in the railroad industry have been tried and failed. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-380 (1969). In particular, Congress has expressly neither prohibited nor authorized secondary picketing in the Railway Labor Act.

This fundamental dichotomy in the policies of the Railway Labor Act between the detailed procedures which must be utilized and the unspecified self-help measures which implicitly may then be utilized is placed in sharp focus by this case. On the one hand, the primary employees are seeking to exercise, after the dispute resolution procedures have been exhausted, one of the many techniques of economic self-help the Railway Labor Act does not explicitly prohibit in order to apply indirect economic pressure through other railroads on the primary employer and

to force resolution of the dispute. On the other hand, by picketing the secondary employer railroads, the primary employees are engaging in or causing a labor dispute with those employers, without following the same dispute resolution procedures of the Act already exhausted with the primary employer and thereby causing an interruption of their operations. Because this is inconsistent with the overriding statutory objective of avoiding "any interruption to commerce," (an objective of considerable importance to shippers such as members of The League), this Court should now decide that secondary picketing is not an allowable means of self-help under the Railway Labor Act.

Confronted before with the issue of secondary picketing under the Railway Labor Act, this Court, in view of the conflicting policies in the Act, contented itself with holding that the state courts could not become involved in determining the scope of lawful secondary activity. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal, supra,* 394 U.S. at 392-393.[1] The Court there stated that it would "allow parties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute to employ the full range of whatever peaceful economic power they can muscle, so long as its use conflicts with no other obligation imposed by federal law."*Id.* But the Court should now hold that, because secondary picketing causes an interruption of commerce, it conflicts with just such an obligation, the statutory duty of exerting "every reasonable effort . . . to settle

[1] The issue was also presented in *Atlantic Coast Line Railroad Co. v. Brotherhood of Railway Trainmen,* 385 U.S. 20 (1966), but an equally divided Court was unable to resolve it. *Cf. Trans World Airlines v. Hardison,* 432 U.S. 63, 73 n. 8 (1977).

all disputes." Railway Labor Act, §2 First, 45 U.S.C. §152.

The holding of *Jacksonville Terminal* dealt only with the state pre-emption issue. But some of the lower federal courts (including the court below in this case) have improperly interpreted that case to say that the Railway Labor Act allows any and all secondary activity without requiring exhaustion of the Act's dispute resolutions procedures before the activity may be utilized. See Pet. App. pp. 10a-19a. See also *Richmond, F. & P. R. Co. v. Brotherhood of Maintenance of Way Employees,* 795 F.2d 1161, 1164-66 (4th Cir. 1986), *Central Vermont Ry. Inc. v. Brotherhood of Maintenance of Way Employees,* 793 F.2d 1298, 1302-3 (D.C. Cir. 1986) and *Consolidated Rail Corp. v. Brotherhood of Maintenance of Way Employees,* 792 F.2d 303 (2nd Cir. 1986). However, other Courts of Appeals have accepted the notion that in certain circumstances the federal courts may determine what is allowable secondary activity under the Railway Labor Act. *Ashley, D. & N. Ry. Co. v. United Transportation Union,* 625 F.2d 1357, 1367-1369 (8th Cir. 1980); *In Re Brotherhood of Railway, Airline and Steamship Clerks,* 605 F.2d 1073, 1075 (8th Cir. 1979) and *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R. Co.,* 362 F.2d 649, 655 (5th Cir. 1966).[2]

This Court, however, has not previously ruled on the scope under the Railway Labor Act of lawful,

[2] Affirmed by an equally divided Court, 385 U.S. 20 (1966). The Fifth Circuit's position would also be controlling precedent in the Eleventh Circuit. *Florida v. Royer,* 460 U.S. 491, 505 n. 10 (1983).

non-violent, self-help economic activity.[3] Clearly, any such activity directed entirely against the primary employer is permissible once the Act's dispute resolution procedures have been exhausted. But in order to implement the fundamental purpose of the Act of avoiding to the greatest extent possible interruptions to the operations of neutral railroads, at the very least the Act's dispute resolution procedures must be observed with respect to the non-primary railroads before secondary picketing can be utilized.[4]

II. The Norris-LaGuardia Act Should Not Bar Injunctive Relief when Secondary Picketing Is Inconsistent with the Railway Labor Act

This Court also should decide that secondary picketing by railroad employees may be enjoined by federal courts under the Norris-LaGuardia Act. The issue involves determining whether such secondary picketing is activity "involving or growing out of any labor dispute."Sections 1, 4 and 13 of the Act, 29 U.S.C. §101, §104 and §113. This Court has given a broad interpretation to the statutory definitions of a

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[3] The Court has held that Section 2 First of the Act does place a duty on the parties to a dispute to continue to bargain in good faith even after the specific dispute resolution procedures of the Act have been exhausted. *Chicago and N.W. Ry. Co. v. United Transportation Union*, 402 U.S. 570, 574-78 (1971). It has also held that the Act's duties limit the ability of the carriers to change the status quo during the period following exhaustion of the Act's procedures. *Brotherhood of Railway Clerks v. Florida East Coast Ry. Co.*, 384 U.S. 238, 244-48 (1966).

[4] There is also considerable support for the view that secondary picketing is absolutely barred, either because it was already unlawful at the time the Railway Labor Act was passed, or because it contravenes overall national labor relations policy. See petitioners' brief, pp. 20-21 and 29-35.

labor dispute. *Jacksonville Bulk Terminals v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 711-714 (1982). But the Court has also said:

> We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable.

Brotherhood of Railroad Trainmen v. Chicago R. & I. R. Co., 353 U.S. 30, 40 (1957). This Court has established the principle that the Norris-LaGuardia Act does not deprive federal courts of jurisdiction to enter injunctions to ensure compliance with the various mandates of the Railway Labor Act. *Chicago & N.W. Ry. Co. v. United Transportation Union*, 402 U.S. 570, 581-82 (1971) and cases there cited.

The lower federal courts, lacking any definitive guidance from this Court on whether injunctions against secondary picketing in the railroad industry were prohibited by the Norris-LaGuardia Act, have arrived at divergent views of the matter. In the case previously before this Court, the Court of Appeals for the Fifth Circuit had held that a test based on a determination of the employees' economic self-interest should be applied in interpreting the statutory terms involved. *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R. Co., supra*, 362 F.2d at 653, 655. This test has also been explicitly adopted by the Eighth Circuit in *Ashley D. & N. Ry. Co. v. United Transportation Union, supra*, 625 F.2d at 1362-64.

The court below in this case, on the other hand, expressly rejected this test, and held that the literal terms of the Norris-LaGuardia Act removed federal court jurisdiction to enjoin such secondary picketing whether or not it could be found to be inconsistent with the Railway Labor Act. Pet. App. pp. 19a-23a. See also *Richmond F. & P. R. Co. v. Brotherhood of Maintenance of Way Employees*, *supra*, 795 F.2d at 1166-67, *Central Vermont Ry. Co. v. BMWE*, *supra*, 793 F.2d at 1299-1301, and *Consolidated Rail Corp. v. BMWE*, *supra*, 792 F.2d at 305.

These divergent views on the application of the Norris-LaGuardia Act to secondary picketing in the railroad industry have resulted in prolonging labor disputes in that industry, and causing unsettled labor conditions to the detriment of the uninterrupted flow of commerce. This Court must provide the parties to present and future labor disputes with a uniform nationwide understanding of the role, if any, of injunction suits in regulating secondary picketing in the railroad industry. If the Court rules, as urged here, that the duties imposed by the Railway Labor Act do not permit secondary picketing until the dispute resolution procedures have been exhausted, then injunctive relief should be available to enforce those duties. If the role of injunctions in this area is thus settled, then the parties to labor disputes will be able to formulate their strategies so as to allow the interplay of economic forces to provide the impetus for prompt resolution of such disputes. Such prompt resolution of railroad labor disputes would plainly be of substantial benefit to all users of the transportation services provided by the railroads and their employees.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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